Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1994

MAX WEISBERG,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was the complaint totally defective and thus inadequate to establish jurisdiction, where it failed to allege the essential element that the offense was intentional or to cite the proper criminal statute?

Was petitioner's right to due process of law violated by his guilty plea where (A) the record showed confusion at the plea; (B) at sentencing and the motion to withdraw the plea petitioner was shown by uncontradicted evidence to have been, for many years, mentally deficient and unable to understand that his conducted was either legally or morally wrong, (C) he was acquitted of an identical offense a short time after the plea because of mental deficiency, and (D) no hearing was ordered to evaluate his competence?

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PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Petitioner Max Weisberg petitions for a writ for certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as Weisberg v. State of Minnesota, 29 F.3d 1271 (8th Cir. 1994). The earlier decision of the Minnesota Court of Appeals on direct appeal of the conviction is State v. Weisberg, 473 N.W.2d 381 (Minn. App. 1991), review denied.

JURISDICTION

Judgment was entered July 19, 1994. Rehearing and rehearing en banc were denied on August 30, 1994. The statutory provision believed to confer jurisdiction for review on certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, who has been mentally deficient since childhood, seeks review of the split decision of the Eighth Circuit which reversed an order of the District Court granting relief under 28 U.S.C. §2254.

PROCEDURAL HISTORY

The First Prosecution

On June 19, 1989, Petitioner pled guilty in Minnesota state court to sports bookmaking. On November 16, 1989, the court stayed imposition of sentence and placed Mr. Weisberg on probation on condition he not engage in further gambling.

The Second Prosecution

On May 22, 1990, he was again charged with sports bookmaking, and on November 9, 1990, in a trial in state court, the jury acquitted him by reason of mental deficiency.

The Probation Revocation

Despite the acquittal the prosecution moved for violation of probation on the earlier case, based upon the conduct of which he was acquitted in the second case. The defense moved to vacate the earlier conviction on the grounds that 1) the court lacked jurisdiction because the complaint failed to state the essential element of intent and 2) the guilty plea was invalid and violated due process because of the defendant's mental deficiency. The court denied the motions, and found the probation violated despite the acquittal.

The State Appeal

On appeal, the Minnesota Court of Appeals reversed the probation violation because there was no factual basis for it in view of the acquittal in the second prosecution, but it affirmed denial of the motion to dismiss as untimely and lacking merit, and it affirmed denial of the motion to vacate the plea, holding the plea was not involuntary. State v. Weisberg, 473 N.W.2d 381 (Minn. App. 1991) (Appendix.) The Minnesota Supreme Court denied discretionary review.

The Habeas Corpus Petition

Mr. Weisberg then filed this proceeding under 28 U.S.C. § 2254. A magistrate judge in a detailed report recommended that relief be granted. (Appendix.) The United States District Court adopted the report and granted the petition. (Appendix.)

The Federal Appeal

On appeal a majority of a panel of the Eighth Circuit reversed, holding that the plea valid and voluntary, that petitioner

was competent to enter the plea and not entitled to a hearing, and that the failure of the complaint to allege intent was not fatal. Weisberg v. State of Minnesota, 29 F.3d 1271 (8th Cir. 1994) (Appendix.) A petition for rehearing and suggestion for rehearing en banc were denied on August 30, 1994, over one dissent. (Appendix.) The District Court then vacated its previous order and denied the writ.

STATEMENT OF FACTS

The Charge and Guilty Plea

The original complaint, citing Minn.Stat. §609.75, said only: the defendant "did wrongfully, unlawfully engage in sports bookmaking," (but § 609.75 is merely a definitional section, and the complaint did not cite the statute which creates the crime of sports bookmaking, Minn.Stat. § 609.76).

Pleading guilty, Mr. Weisberg admitted the offense, said the plea was voluntary, and that he understood the proceeding (Transcript of plea, June 19, 1989). His mental condition was not specifically addressed at this time, but there were indications of incompetence. Born in 1924, Mr. Weisberg had gone only through the sixth grade, attending mostly "special schools"; he never married, lived alone with his brother, and sold flowers and newspapers "on the street corner." Asked if he had been treated for a mental condition, he said:

> A. Well, I'm not in good condition right now. I have a lot of trouble. Every couple of hours I have to go to the bathroom and I have trouble with my insides, stomach here. I have trouble at night when I go to bed.
>
> * * *
>
> Q. Have you ever sought the treatment of a psychiatrist or psychologist?
>
> A. Psychiatrist, no. (Id.)

Questioned about the quantity of wagers he accepted, an essential element of the offense, Mr. Weisberg did not seem to understand:

> Q. Okay. And you took more than five bets during that period of time, is that right?
>
> A. You mean one day, more than five bets, is that what you said?
>
> Q. More than five bets during that entire period.
>
> A. More than five --
>
> Q. Between November 13 and December 4 of 1988, you received calls?
>
> A. Are you talking about daily now? (Id, B43)

Mr. Weisberg's counsel then intervened:

> MR. [STEVEN] MESHBESHER. Excuse me. May I? Max, between the two dates of November 13, 1988, and December 4, 1988 -- we are talking about approximately a three-week period -- during that three-week period you took more than five bets, right?
>
> THE DEFENDANT. Can ask [sic] a question? Are you talking about daily?
>
> MR. MESHBESHER. No. In that three-week period did you take more than five bets?
>
> THE DEFENDANT. I suppose there was, yes. I'm sorry. I didn't understand the question so I couldn't answer it.
>
> BY MR. FINK.
>
> Q. And of the bets you took, they total more than $2,500 during that period of time, right?

A. Are you talking about total bets or daily bets or –

* * *

THE DEFENDANT. I have one complaint to make.

THE COURT. You have a complaint you want to make?

THE DEFENDANT. Yes, sir.

THE COURT. Why don't you ask your attorney first whether he thinks you should make that complaint.

After Mr. Weisberg and his counsel conferred the following ensued:

THE COURT. I understand that your client has some complaints. You can make them properly through your attorney. What you want to complain about now doesn't concern the Court.

THE DEFENDANT. I'm sorry.

THE COURT. We can talk, but we have to talk at different times and not at the same time. So if I'm talking, don't you say anything.

THE DEFENDANT. I won't say no more then. I'm sorry I said something. (Id.)

The court then accepted the plea.

Sentencing

At sentencing, the judge said he had read the presentence investigation, and:

After reading through it I was somewhat concerned and I have done a little bit of investigation on my own in

an attempt to come to other conclusions concerning sentencing. (Transcript of Sentencing.)

Defense counsel, Ronald Meshbesher, stated that he had only that day seen the report, and added:

> In that section I found out something that I was not aware of, and because of that I'm going to move the Court to allow Mr. Wiesberg [sic] to withdraw his plea because I think it was improperly entered in that we did not consider his mental status and his ability to comprehend the charges made and what he believed was right and wrong based upon the I.Q. reports which for the first time were disclosed to me in the confidential report.

The state opposed this motion, and defense counsel added:

> In talking to the defendant -- and I have not represented him personally until now; my office did through another lawyer -- I find that in his own mind he doesn't believe he did any wrong (sic) and he cannot comprehend the reasons why society is imposing this burden on him, and I think it ought to be explored through a competent psychiatrist or psychologist so we can give him an opportunity to have a fair trial. (Id.)

The judge said that at the plea Mr. Weisberg seemed to communicate and understand the proceeding "at least on that date"; but he said he would consider a continuance, adding:

> I don't have any trouble with that because I'm absolutely positive that your client is not going anywhere and that he will appear for all court appearances.
>
> I will tell you that I personally am concerned as to his attitude that was evidenced in the presentence investigation wherein he indicated. . . . I want you to see what the Court has highlighted and triple highlighted

items in here that were of grave concern to me. And it struck me and I think I even mentioned to members of my staff that I could hardly see how anybody that is really very smart would make certain statements as he made specifically for the record.

MR. MESHBESHER. This is what it says, too, Your Honor. The defendant does not in any manner or form look upon the instant offense as a misdeed or violation of the law. And I think that's because of his mental deficiency. As a result of this he doesn't know what he is doing. He doesn't look upon it as violation of the law.

THE COURT. He knows what he's doing and he certainly knows the nature and consequences of his act because he served time in jail before for doing the same thing.

MR. MESHBESHER. But he doesn't know the difference between right and wrong when it comes to this particular offense, and that's what he said right to the probation officer. He is honest to a fault, and that's one thing. Some people come up to the court and give him a con game and you find out and are disappointed. This man will not lie to the court in any way, shape, or form.

THE COURT. Well, I have gotten no tap dancing from him. The part that concerned me is the statement that he made that he had absolutely no intention of stopping his involvement in bookmaking and that he was willing to accept incarceration in the future should he be caught at it. Now, that bothered me. (Id.)

At this point Mr. Weisberg insisted on making some remarks about his concern for his brother:

THE DEFENDANT. I will say this: The state says if my brother pled guilty, is that correct, when we were there before? I mean if I pled guilty my brother would get -- would have against the state. The state has had nothing on my brother at all, and that was the consequence when I went -- when you had me before. If my brother -- if I pled guilty, you let my brother go. The state had nothing on my brother at all. If you go back, and see that in your mind, that's what the deal was made. Is that right or wrong? Isn't that right? The state said if I pled guilty they would drop the case of my brother. Isn't that correct?

THE COURT. Sir, all I know is what --

THE DEFENDANT. You were there the last time. Wasn't that the deal when Steve Meshbesher was my attorney? Isn't that correct?

THE COURT. Yes.

THE DEFENDANT. Well, but now they figure that that wasn't a true statement. There was no case on my brother at all. They had nobody to stand up and say that my brother took any bets from anybody. And if you look back on your records, that's what it is. Now we are trying to prove that that is not a true fact because the state had nobody to testify about my brother taking any bets of any kind. That's what the deal was when I was with you in the other court. Isn't that correct?

THE COURT. I can't recall with the great detail that you can concerning these things. I remember that they weren't going to prosecute your brother, but I also remember you admitting to taking bets. (Id.)

The prosecutor objected to a continuance, but the court said:

THE COURT. The last time it was continued it was at my request because I felt uncomfortable with it. I have felt uncomfortable with some of these things that I see here. . . . The clear feeling of the probation officer is that this defendant just doesn't feel that what he did was wrong, that it's a legitimate means for socialization. But that doesn't meet the test of whether he knew it was wrong and he is unwilling to take the consequences. . . . I am not inclined, Mr. Meshbesher, I want you to know this, to allow him to withdraw his plea. . . . I will tell you, you're up between a rock and a hard place because unless you present me something awfully overpowering, I think all the evidence in this case indicates that he's got to pay the consequences for what he did. And he is willing to do it.

MR. MESHBESHER. Well, I am not willing, Your Honor, to sacrifice him because he really doesn't understand the consequences of the law or why the law has made this illegal. He doesn't believe in his mind, as he told the probation officer, that this is illegal. And one thing he told he is, they allow lottery, they allow horse racing, they allow everything else, and he says I'm not bothering anybody. I don't take a penny from welfare. I've always taken care of myself.

Most of the money that he made went back to 40 or 50 years when he peddled flowers on the streets along with newspapers. You're not talking to a man that can think on a sophisti-cated level that you and I can think or the average kid graduating high school. He has a fifth grade education. He was in the home for the retarded at Faribault years ago. Your I.Q. may improve somewhat, but isn't going much beyond 55 no matter what happens.

* * * *

THE COURT. The next time we come in it's going to be either that I grant your motion to withdraw, which I doubt that I'm going to do --

MR. MESHBESHER. Don't make up your mind. Hear me out first.

THE COURT. I will hear you out, but I'm satisfied that he knew what he did when he entered his plea.

THE DEFENDANT. I did it for my brother. (Id.)

Sentencing was continued to November 16, 1989.

The court asked Mr. Weisberg if he had anything to say, and he replied, in part:

I would like to say that I never looked for anybody. I never associated with anybody that gambles. People that gamble with me are people that I have bet with myself. And I know when I do take a bet from a person that the money will be there.

Most people that gamble with me are people that have been gambling with me for years, and I don't take any new customers in. These people are -- I don't look for them; they seem to look for me. And that's about all I can say.

I have been honorable with everybody and I have been honest and I'm telling the truth. And I am not a person that hurts anybody. . . .

I'm an honest person. I don't try to cheat nobody. I'm as honest as you can make me. I had a few guys that called me. They keep calling me. I don't ask anybody to call me. They just come over because they know when they win their money will be there. That's about all I can say.

I try to be honest with people. I don't hurt anybody. The only record I have is gambling, and it shows in the record that I have never beat anybody out of anything. I had no other cases besides gambling. That's the only thing I ever had. (Id.)

The court then said this to Mr. Weisberg:

THE COURT. That's a hundred percent right; that's what your record is, a whole lot of gambling. I have seen you around town. Being a St. Paul person myself, I have seen you selling flowers, seen you selling newspapers. . . .

I'm going to tell you that your gambling days are over. And if you don't think they are over, then it's going to be you that's going to trade your liberty for gambling. And if you consider being behind bars in prison more important, then the choice is going to be up to you, sir, because you're going to be the one that's going to determine where you're going to go and what you're going to do. . . .

Now, let me make this clear to you sir: I have had quite a few people come and speak on your behalf to me. I have had police officers who are involved in enforcement and other people on your behalf from within the community, and they agree with you. They think you're an honest man, they think you're a decent human being, and I have heard of acts of kindness that you have performed throughout your life for people who are distraught and down and out. . . .

Now, I want you to look me in the eyes, Mr. Weisberg, just so you understand and know this: Bookmaking is over unless you chose to go to prison for 15 months. I don't think that our prison system is a place for a sweet and nice man like yourself, but that's

where you will go. The first time you make book and you are brought into court, Mr. Weisberg, you are the person calling the shots as to where you will live for 15 months. It won't be me, it won't be anybody else, it will be yourself making that decision. Do you understand me, sir?

THE DEFENDANT: Yes. I do. ((Id.) emphasis added)

The Second Prosecution and Acquittal

Despite this, Mr. Weisberg was arrested again six months later for a similar offense. After a jury trial, he was acquitted on the grounds of mental deficiency.

A psychological evaluation on October 15, 1990, concluded that he did not understand that his gambling activities were "wrong from either a legal or moral standpoint." (Report of Dr. Kenneth Perkins, Nov. 1, 1990.) He had been diagnosed in 1939 as "feebleminded" and as having "mental deficiency: moron, cause undiagnosed," and the doctor said he was a child-like man who did not understand gambling was wrong. He noted he was 66 years old (though Mr. Weisberg thought 67), had lived all his life with his mother until she died, and then for 15 years with his brother, sold newspapers and flowers on the streets for years, and had an overall I.Q. of 80 (it had been 55 in 1939); except for numerical reasoning and memory (which raised his I.Q. from below 70 to 80), nearly all his tests were "very low and into the mentally retarded range"; his "social comprehension and awareness" were "extremely poor" and "well down into the defective range"; his general knowledge and vocabulary were in the "mentally retarded range"; his numerical abilities had a "savant-like quality" - i.e. he could function reasonably only with numbers; his reasoning otherwise was "very concrete and simplistic, child-like." The doctor concluded:

Mr. Weisberg is adamantly convinced that he has done no wrong in his gambling activities, does not see why

> his situation is any different from society's legalized gambling, and does not see why he should be singled out for punishment. . . . Mr. Weisberg clearly does not understand that his gambling activities are wrong from either a legal or a moral standpoint.

(Id. Emphasis added). There was no evidence to the contrary.

The Probation Violation and Motion to Vacate the Plea

Despite the acquittal, the prosecution sought violation of probation, and the defense moved to dismiss and to vacate the guilty plea because the complaint did not recite the essential elements and the court therefore lacked jurisdiction, and because of Mr. Weisberg's mental deficiency the plea was invalid.

At the hearing the judge said the jury acquittal "has absolutely no binding effect upon this court concerning whether or not a probation violation has taken place," found a violation and sentenced Mr. Weisberg to probation with 20 days in a jail facility to be served ("coincidentally") on the "dates of the Super Bowl, the state hockey tournament, and the state basketball tournament." He also found the complaint valid.

The State Appeal

On appeal the Minnesota Court of Appeals held: first, that the order revoking probation was invalid because it lacked a factual basis in view of the acquittal in the second prosecution. But the Court held the motion to dismiss for failure to state an offense was untimely, and that defects in the complaint did not cause "manifest injustice." 473 N.W.2d 381, 383 (Minn. App. 1991) (Appendix). As to the assertion that the plea was unintelligent and involuntary, the Court of Appeals held:

> The jury considered only Weisberg's competency to commit sports bookmaking at the time of the second offense, and its verdict is not dispositive of Weisberg's

> capacity at an earlier point in time. . . . The evidence supporting incompetency, including commitment records, the jury's recent verdict, and a psychologist's report, is strong but not conclusive. . . .

473 N.W.2d at 383-384 (citations omitted).

A petition for review by the Minnesota Supreme Court was denied on October 11, 1991, 473 N.W.2d at 381.

Habeas Corpus

Mr. Weisberg then filed his petition under 28 U.S.C. § 2254, and the District Court granted the writ. The state appealed.

The Decision Below

The panel of the Eighth Circuit, over Judge Heaney's dissent, reversed. (Appendix.) It first observed the plea itself had been "uneventful," 29 F.3d at 1274, ignoring the confusion over the elements of the offense and petitioner's wish to make a "complaint," set forth above.

Acknowledging that an incompetent person has "a due process right not to be convicted" and "a due process right, in certain circumstances, to have their competency determined in an evidentiary hearing," 29 F.3d at 1275-76, citing inter alia, Drope v. Missouri, 420 U.S. 162, 172 (1975), the majority found in the record no "sufficient doubt" that Mr. Weisberg was competent to require a hearing. 29 F.3d at 1276.

Next, the majority rejected the district Court's finding that the record demonstrated Mr. Weisberg was incompetent, finding the 1939 diagnosis of "negligible relevance," and the effect of the acquittal weakened because it followed the plea by "a significant period of time." 29 F.3d at 1277. The majority minimized the doctor's report, saying it "did not conclude that Weisberg was incompetent," and that it showed rather he "chose to defy the law," but overlooking the doctor's uncontradicted conclusion that Mr. Weisberg "clearly does not understand that his gambling activities are wrong from either a legal or a moral standpoint."

As to whether the plea was knowing and voluntary, the majority said the doctor's report was "ambivalent and thus unpersuasive," that the record showed knowledge and voluntariness, and that Mr. Weisberg's concern for unfounded charges against his brother did not show coercion. 29 F.3d at 1278-79.

The majority held, finally, that the defects in the complaint for failure to cite the proper statute or allege the offense was "intentional" were not jurisdictional defects under Minnesota law (without citing State v. Oman, 265 N.W.2d 277 (Minn. 1963) infra), but a mere "alleged technical defect," which had been waived. 29 F.3d at 1280. It therefore deferred to the state court's ruling. 29 F.3d at 1281.

Judge Heaney dissented, stating that the failure to allege intent was more than a "technical defect" because it went "to the very heart of the indictment and deprived Weisberg of due process," citing inter alia, Russell v. United States, 369 U.S. 749, 763-64 (1962), 29 F.3d at 1281, . Moreover, Judge Heaney noted, the failure to allege an essential element "can be raised at any time" and therefore was not waived, 29 F.3d at 1281, and "on any reading of the indictment, however liberal, the necessary intent element is nowhere to be found." 29 F.3d at 1282. As to the prior state decision, Judge Heaney observed that this was a federal constitutional right of which Mr. Weisberg could not be deprived by a state court, and that in any event settled Minnesota law on the point is identical to federal law. Id. Thus Judge Heaney concluded there was no jurisdiction and would have affirmed the District Court's grant of the writ. 29 F.3d at 1283.

A petition for rehearing and suggestion for rehearing en banc were denied, Judge McMillian voting to grant.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT AND THE DISSENT BELOW WERE CORRECT IN RULING THAT THE COMPLAINT WAS FATALLY DEFECTIVE; FAILURE TO ALLEGE INTENT AND THE PROPER CRIMINAL STATUTE WAS A JURISDICTIONAL DEFECT THAT CAN BE RAISED AT ANY TIME.

As the District Court, and Judge Heaney in his dissent, rightly concluded, the failure to allege the essential element of criminal intent is a jurisdictional defect in a complaint or indictment, which can be raised at any time and is not waived by a guilty plea. The majority's decision below conflicts with the law that has been established by this Court, other Courts of Appeals, and even earlier decisions of the Eighth Circuit.

As the Court said in Hamling v. United States, 418 U.S. 87 (1974):

> Our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense . . . .

Conversely, however, if a complaint "fails to allege elements of scienter that are expressly contained in the statute that describes the offense," United States v. Pupo, 841 F.2d 1235, 1239 (4th Cir. 1988), United States v. Opsta, 659 F.2d 848, 850 (8th Cir. 1981), it is defective. The omission is a matter of substance, not mere form. United States v. Denmon, 482 F.2d 1093, 1096 (8th Cir. 1973). Reference to the applicable statute does not cure the defect. United States v. Zangger, 848 F.2d 923, 925 (8th Cir. 1988), United States v. Wabaunsee, 528 F.2d 1, 3-4 (7th Cir. 1975). Only "technical" defects are waived. Hagner v. Untied States, 285 U.S. 427, 431 (1932).

In the present case the complaint alleged in pertinent part:

> WHEREFORE, your complainant alleges that the defendants between November 13, 1988 and December 4, 1 988 in Ramsey County, aiding and abetting and being aided and abetted by each other did wrongfully, unlawfully,
>
> engage in sports bookmaking,
>
> Said acts constituting the offense of:
>
> SPORTS BOOKMAKING
>
> in violation of Minnesota Statutes:
>
> 609.75, subd. 7; 609.03 and 609.05 . . . .

Use of the word "unlawfully" is not sufficient, if the statute requires intent. United Sates v. Carll, 105 U.S. 611, 612-13 (1881). Here the statutes, Minn. Stat. §§ 609.05 and 609.75, subd. 7 require the acts be done "intentionally."

As the District Court found, and the dissent below agreed,

> the historical fact that the state courts upheld the sufficiency of the complaint is essentially irrelevant to this federal habeas corpus proceeding. With all due respect to the state courts, this Court must independently determine questions of law, such as whether the complaint in this case satisfies the minimal constitutional standards set forth above. See Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Jones v. Jones, 938 F.2d 838, 842 (8th Cir. 1991). Respondent's argument misapprehends the nature of federal habeas corpus review, which would be rendered a mere nullity if legal conclusions by the state courts could be urged in federal court as a basis for denying relief.

Secondly, by focusing solely on an alleged lack of prejudice, respondent has completely failed to address

> the merits of petitioner's claim that the complaint was constitutionally defective for failure to allege the essential element of criminal intent. Respondent has neither asserted that intent is not an essential of the offense, nor pointed to any language in the complaint or elsewhere that could be construed to allege criminal intent. Thus, petitioner's claim--that intent is an essential element of the offense of sports bookmaking that was omitted from the complaint--stands unrebutted. (Magistrate's Report, Appendix.)

Beyond this, the statute cited in the complaint was not the statute creating the offense, but a mere definitional provision. Minn. Stat. § 609.75, subd. 7. The criminal statute, Minn. Stat. §609.76, was neither cited nor quoted. Thus the complaint failed not only to allege intent, but any crime.

Prior Minnesota law supports this conclusion. Rule 2 of the Minnesota Rules of Criminal Procedure requires that a complaint be a 'written signed statement of the essential facts constituting the offense charged.' (emphasis added); see also Rule 17.02. Referring to an indictment, the Minnesota Supreme Court in State v. Oman, 121 N.W.2d 616 (Minn. 1963) said the accusation must contain "the elements of the offense intended to be charged." See also State v. Serstock, 402 N.W.2d 514 (Minn. 1987).

As the record shows, Mr. Weisberg displayed an obvious lack of understanding of intent (and of the elements of time and amount) in entering his guilty plea; the undisputed medical evidence showed he was incapable of such an understanding. See United States v. Vesaas, 586 F.2d 101, 103 (8th Cir. 1978), where the Court said, "It is fundamental that an indictment must contain the elements of the offense charged and fairly inform the defendant of the charge in order that he may defend against it," citing Hamling v. United States, 418 U.S. 87, 117-18 (1974).

This is true, of course, even where the accused has his full faculties, and the concern is heightened where there is mental deficiency. Lack of mental capacity is not waived by a guilty plea,

Hirt v. State, 214 N.W.2d 778 (Minn. 1974), and a failure to state an offense is also a nonwaivable defect. Albrecht v. United States, 273 U.S. 1, 8 (1927).

In Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that due process was violated where a defendant was not adequately informed of the essential element of intent, and a second-degree murder conviction was held invalid; that, too, was a post-conviction attack on the conviction by federal habeas corpus successfully challenging a state conviction. The defendant had a "functioning I.Q." of "between 68 and 72," which is "substantially below average intelligence," 426 U.S. at 642, footnote 9. The indictment charged that he "willfully" stabbed his victim; the defendant was found competent to stand trial, but the Court held this did not validate the plea. Ibid.

Mr. Weisberg's mental deficit underscores the importance of making the charging instrument reasonably specific so the accused can comprehend the essential elements, especially an accused who is mentally impaired.

Therefore the authorities uniformly, manifestly support the order below.

II. THE RECORD AMPLY DEMONSTRATES THE DISTRICT COURT WAS CORRECT IN FINDING THAT MR. WEISBERG WAS INCOMPETENT TO ENTER THE GUILTY PLEA, AND HIS RIGHT TO DUE PROCESS WAS THEREFORE VIOLATED.

A guilty plea must be a voluntary and intelligent choice of alternatives, North Carolina v. Alford, 400 U.S. 25 (1970), and the record must "affirmatively disclose" understanding and voluntariness," Brady v. United States, 397 U.S. 742, 747 n.4 (1970). As the District Court said:

> The ultimate question of whether a guilty plea was voluntary and intelligent is one of law, which must be independently determined by a federal habeas court without deference to previous decisions by state courts.

Woods v. Armontrout, 787 F.2d 310, 317 (8th Cir. 1986) (Magistrate's Report, Appendix.)

After reviewing the uncontradicted evidence of a lack of understanding the District Court said:

> Against this background, petitioner's plea petition and his affirmative responses to leading questions as to whether he 'understood' the proceedings were insufficient to 'affirmatively disclose that [he] . . . entered his plea understandingly and voluntarily.' Brady, 397 U.S. at 747 n. 4. Petitioner's confused and inaccurate responses should have instead alerted the trial court that a competency evaluation was constitutionally required before the plea could be accepted. See Rule 20.01, subd. 1, Minn.R.Crim.P.; Drope v. Missouri, 420 U.S. 162, 172-73 and n. 9 (1975); . . . . Rinehart v. Brewer, 561 F.2d 126, 130 (8th Cir. 1977). In addition, the appellate court had before it admittedly 'strong' evidence of petitioner's incompetence, including his 1939 commitment record; the jury's finding of mental deficiency; and a recent, undisputed psychological evaluation. Weisberg, 473 N.W.2d at 383. This evidence was more than sufficient to contradict and overcome petitioner's rote recitations in his plea petition and hearing testimony that he 'understood' the charge and the guilty plea proceedings. See Gonzales v. Grammer, 848 F.2d 894, 900 (8th Cir. 1988). Due to his low intelligence, petitioner was essentially unqualified to testify as to his own level of understanding. (Magistrate's Report, Appendix.)

Thus the court concluded,

> Here there is nothing in the plea petition or transcript of the guilty plea hearing to show that the essential element of criminal intent, which was omitted from the

complaint, was ever explained to petitioner by anyone, and none of the state courts made any contrary factual findings on this issue. It seems clear from petitioner's statements that if he had been asked at the guilty plea hearing whether he intended to break the law or commit a crime when he took bets, his response would surely have indicated his complete lack of understanding of the essential element of intent. That petitioner was never properly advised of the intent element is perhaps understandable in light of his limited intelligence, but it is nevertheless not excusable. See Henderson, 426 U.S. at 647 (vacating guilty plea and murder conviction where defendant, who had 'unusually low mental capacity,' was never informed of element of criminal intent). . . .

The Court believes that the complete lack of any allegation of criminal intent in the complaint, together with petitioner's demonstrated mental deficiency, combine to preclude application of a "presumption that counsel explained the nature of the charge to defendant . . ." Gregory, 774 F.2d at 315; see also Henderson, 426 U.S. at 647 (presumption that counsel explained charges "may be appropriate in most cases . . . .").

The crime of sports bookmaking is unlike more traditional crimes at common law, which proscribe conduct that is "malum in se" and not merely "malum prohibitum." See United States v. Donahue, 948 F.2d 438, 441 (8th Cir. 1991), cert. denied, 118 L.Ed.2d 314 (1992) (discussing sufficiency of indictment alleging bank robbery, which is "malum in se"). The State of Minnesota no longer regards gambling as morally wrong, and, unlike a bank robbery, a gambler could unintentionally commit a technical violation of Minnesota's sports bookmaking law simply through careless record keeping.

Since a guilty plea involves waiver of jury trial (and all other trial rights and procedures), such a waiver must be knowing and intentional in all the circumstances. Humphrey v. Cady, 405 U.S. 504 (1972). Where competence is in issue the court has a duty to hold a hearing. Pate v. Robinson, 383 U.S. 375 (1966). Any conviction while incompetent violates due process. Bishop v. United States, 350 U.S. 961 (1956).

At the trial where the jury made a finding of mental deficiency, the trial court instructed the jury pursuant to Minnesota Criminal Jury Instruction Guides, 6.02, which reads in relevant part as follows:

> . . . a person is not criminally liable for an act when, at the time of committing the act, the person did not know the nature of the act, or did not know that it was wrong because of a defect of reason caused by a mental deficiency.

Here we have accusation of the same defendant, by the same state, in the same county, and in a trial on the same statutory offense, with acquittal on the grounds of a mental condition that manifestly existed at the time of the recent plea. Indeed because of the earlier proceeding, if anything at the time of the jury trial Mr. Weisberg (had he been competent) would have been more informed and on notice of the nature of his conduct, and he was nevertheless acquitted. It follows a fortiori that if he had no criminal intent when he was acquitted he could have had none at the guilty plea.

In Henderson v. Morgan, supra, 426 U.S. 647 (1976), this Court found a murder plea invalid because of the failure to show the accused adequately understood the essential element of criminal intent. Henderson pled guilty; denied relief in state court, he was granted federal habeas corpus relief, which this Court affirmed, because the element of intent had not been explained, since "a guilty plea is an admission of all the elements of a formal criminal charge," and "it cannot be truly voluntary unless the

defendant possesses an understanding of the law in relation to the facts," quoting McCarthy v. United States, 394 U.S. 459, 466 (1969) (emphasis added).

The parallels between Henderson and the present case are compelling: The defendant in Henderson had been committed to a mental hospital when in the seventh grade, then was released and killed his employer; his I.Q. was between 68 and 72. 426 U.S. at 642, footnote 9. Petitioner's I.Q. was described variously as 55 (in 1939, when he was committed as "feeble-minded" and diagnosed with a "mental deficiency: moron"), 75-84 (overall I.Q. 80 in 1990, which, if the numerical skills and other levels were adjusted, would be "substantially lower," overall 71).

In Henderson, defense counsel told the Court the defendant had not meant to do harm; here defense counsel and Mr. Weisberg as well as Dr. Perkins, repeatedly insisted he did not believe had done wrong. 426 U.S. at 643. The Henderson Court acknowledged that defense counsel "were certainly familiar" with the requirement of intent, and believed the evidence could sustain a jury verdict of guilty, and that even if the defendant had understood intent "he probably would have pleaded guilty anyway." 426 U.S. at 644, footnote 12. Despite this assumption, however, and despite the further assumption that the prosecution had "overwhelming evidence of guilt available," and despite recognition of counsel's "wisdom" in advising a guilty plea, the plea was held invalid. 426 U.S. at 644. The Court observed that intent was not specifically discussed at the plea, adding:

> And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless that defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.' Smith v. O'Grady, 312 U.S. 329, 85 L.Ed. 859, 61 S.Ct. 572.

426 U.S. at 645.

And, the Court said, due process was denied even if proof of intent "would almost inevitably have been inferred from evidence" at trial, including admission of the offense, since the jury "would not have been required to draw that inference." 426 U.S. at 645-646. In the present case, of course, we have confirmation of a point only present conjecturally in Henderson--a jury did acquit Mr. Weisberg.

Finally, the Henderson Court said:

> Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder.

426 U.S. at 647.

Thus the court below departed from Henderson so radically that the decision is irreconcilable and cannot stand. It is even inconsistent with earlier law in the Eighth Circuit.

In Rinehart v. Brewer, 561 F.2d 126 (8th Cir.1977), federal habeas corpus relief was granted to a fifteen year old state prisoner who had pled guilty to murder, where the record did not show adequate understanding. The court said:

> Under these circumstances, a particularly stringent duty is imposed upon both defense counsel and the trial court to make certain that the defendant understands the charges and the consequences of his plea. . . .
>
> If the defendant was not informed that intent to cause the victim's death is an essential element of the crime charged, his guilty plea was not voluntarily entered. Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). . . . Rinehart's age, inexperience, and communication difficulties, coupled

> with inadequate explanations of the nature of the charge and the consequences of his plea made by defense counsel and the court can lead only to the conclusion that Rinehart's guilty plea was not made voluntarily and understandingly.

561 F.2d at 1310-31. (emphasis added)

In Rinehart there was no evidence of mental illness; the defendant was of average intelligence for a 15-year-old. Mr. Weisberg was an elderly man, but incontestably mentally impaired, and "childlike."

Therefore, the decision below, on a very important issue, is fatally at odds with the law as established in this Court and with the Eighth Circuit's own earlier application of Henderson.

CONCLUSION

For these reasons, Petitioner Weisberg prays that the writ be granted so this Court may harmonize and clarify the law.

Respectfully submitted,

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November 28, 1994

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APPENDIX

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-1948

Max Weisberg,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
State of Minnesota,	*	
	*	
Appellant.	*	

Submitted: December 15, 1993

Filed: **July 19, 1994**

Before LOKEN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

HANSEN, Circuit Judge.

Max Weisberg filed a petition for a federal writ of habeas corpus attacking his Minnesota state-court conviction for engaging in sports bookmaking. He alleged that the criminal complaint failed to state the essential elements of the offense

and that his guilty plea is invalid. The district court granted the petition, and the State has appealed. We conclude that Weisberg's 1989 guilty plea was valid and that his attack on the criminal complaint is foreclosed by his plea. We therefore reverse.

I.

In 1989, Weisberg and his brother, Solly Weisberg, were charged with engaging in sports bookmaking between November 13, 1988, and December 4, 1988, in violation of Minn. Stat. §§ 609.75, subd. 7; 609.03; & 609.05. On June 19, 1989, Weisberg pled guilty. The plea proceeding was uneventful, and its transcript is only 12 pages long. In response to questions posed by his defense counsel, Weisberg testified that he had reviewed with his counsel and then signed a "petition to enter plea of guilty," that he understood he was giving up his right to a jury trial, that he chose to plead guilty because he was in fact guilty, and that he did so freely and voluntarily. In response to questions posed by the prosecutor, Weisberg articulately answered questions about his birthdate, address, education, relatives, and marital status. Weisberg also stated that he had not been treated for a "mental condition," that he understood the plea proceeding, and that he did not use drugs or alcohol. After Weisberg answered additional questions to establish a factual basis for the plea, the trial court accepted the plea and ordered a presentence investigation. (Appellant's App. at B37B45.)

On September 28, 1989, the trial court commenced a sentencing hearing. The hearing began with a discussion of the presentence investigation report. Weisberg's counsel stated that, upon reading the presentence investigation report, he learned for the first time that Weisberg had a low IQ and that he had been deemed "feebleminded" in 1940. (Id. at B56-B57.) The trial court, in contrast, expressed concern about

the report's showing of Weisberg's lack of contrition. The court said,

> The part that concerned me is the statement that he made that he had absolutely no intention of stopping his involvement in bookmaking and that he was willing to accept incarceration in the future should he be caught at it. Now, that bothered me.
>
> . . . .
>
> . . . . The clear feeling of this probation officer is that this defendant just doesn't feel that what he did was wrong . . . . But that doesn't meet the test of whether he knew it was wrong and [whether] he is willing to take the consequences.
>
> . . . . [I]t seems to me that . . . he is willing to take the consequences and he likes doing what he is doing . . . .

(Id. at B60, B63.) Relying on the information contained in the presentence investigation report, Weisberg moved to withdraw the plea. (Id. at 56-57.) The trial court addressed the motion and the issue of Weisberg's competence by saying,

> I am not prepared at this time to allow you to withdraw the plea on behalf of the defendant. The defendant was before me in this matter and entered a plea on June 19th, 1989. I have the transcript. I specifically recall his taking the stand and his being interrogated by his attorney . . . .
>
> . . . .

It appeared to the Court that he was aware of what was going on and that he was communicating well with his attorney and that he did understand the nature of what was occurring at least on that date.

However, in the event that you are asking for a continuance to bring new matters before the Court, I would be inclined to allow you to do that so that you could proceed on any basis that you want concerning bringing information before me.

(Id. at B58-B59.) Just prior to adjournment, Weisberg's counsel said, "I will arrange for the testing." (Id. at B66.)

On November 16, 1989, the trial court resumed the sentencing hearing. At the beginning of the hearing, the trial judge addressed Weisberg's counsel as follows:

THE COURT: . . . [H]ave you had an opportunity to go over the P.S.I.?

[WEISBERG'S COUNSEL]: I have, Your Honor.

THE COURT: The last time we met, as I recall, you wanted some time to make some contacts with various people concerning your client.

[WEISBERG'S COUNSEL]: Yes, that's correct; and the Court continued this matter at my request and again at the request of the County Attorney.

THE COURT: Anything you want to tell the Court at this time prior to the time that I sentence this defendant?

> [WEISBERG'S COUNSEL]: Your Honor, I have read the presentence report and shared it with my client, and I have no substantial objections to that report. I think it's fairly accurate about Mr. Weisberg's background and his employment.

(Id. at B69-B70.) Weisberg did not submit any evidence in support of his motion to withdraw the guilty plea, nor did he argue the motion to the court, nor did the court expressly rule on his motion. The trial court imposed a suspended sentence of 15 months of imprisonment, 5 years of probation and 100 hours of community service. Before adjourning, the trial court sternly warned Weisberg that it would impose a sentence of imprisonment if Weisberg violated the terms of his probation by engaging in bookmaking. Weisberg said he understood the court's warning. (Id. at B75-B77.) Weisberg did not appeal his conviction or sentence.

Six months later, in May 1990, Weisberg and his brother were again charged with engaging in sports bookmaking, this time for the period from March 3, 1990, to March 15, 1990. (Id. at B149-B151.) After trial, a jury found that the alleged conduct had been proved beyond a reasonable doubt but that Weisberg was not guilty due to a mental deficiency. (Id. at B22-B23.)

The State then sought to revoke Weisberg's existing probation. It alleged the same conduct that had been alleged in the second criminal complaint. Weisberg then moved to vacate his 1989 conviction and to withdraw his 1989 guilty plea, arguing that the complaint failed to state the essential elements of the offense and that his guilty plea was invalid due to a mental deficiency, In support of his motion, Weisberg submitted the jury's verdict in the second criminal action; a copy of a 1939 probate court judgment, which deemed Weisberg (who was then 15) "feebleminded because of inability to make normal progress in school," (Appellant's App.

at B27); and a three-page letter from a psychologist addressed to Weisberg's counsel, which stated that the psychologist had examined Weisberg on October 15, 1990, (id. at B31-B33). Weisberg did not offer live testimony. The trial court denied Weisberg's motion to vacate the conviction and granted the State's motion to revoke probation. The court again imposed a suspended 15-month sentence, placed Weisberg on probation, and also ordered Weisberg to serve in the county jail three one-week periods coinciding with major sporting events. (Id. at B10-B11.) On appeal, the revocation of probation was reversed, but the denial of Weisberg's motion to vacate was affirmed. See State v. Weisberg, 473 N.W.2d 381 (Minn. Ct. App. 1991).

In March 1992, Weisberg filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleged that the 1989 criminal complaint was defective and that his 1989 guilty plea was invalid. (Appellant's App. at A3-A8.) A magistrate judge filed a lengthy report and recommendation, concluding that relief should be granted on both grounds. A district judge overruled the State's objections and adopted the report and recommendation. The State appeals.

II.

Either of the grounds relied on by the district court is sufficient to support its judgment. We first address the State's argument that Weisberg failed to prove that his guilty plea was invalid.

A.

Weisberg alleged that his "guilty plea is invalid, involuntary and not intelligently made because of his mental deficiency, and because of his concern to save his innocent brother from prosecution." (Appellant's App. at A6.) A

defendant's plea of guilty is valid if (1) the defendant is competent to stand trial and (2) the defendant makes a knowing and voluntary waiver of his constitutional rights. Godinez v. Moran, 113 S. Ct. 2680, 2687 (1993).

1.

Weisberg's argument focusses primarily on the first question, whether he was competent. An incompetent person has a due process right not to be convicted. Griffin v. Lockhart, 935 F.2d 926, 929 (8th Cir. 1991) (citing Drope v. Missouri, 420 U.S. 162, 172 (1975), and Pate v. Robinson, 383 U.S. 375, 378 (1966)). In addition, all criminal defendants have a due process right, in certain circumstances, to have their competence determined in an evidentiary hearing. Id. (citing Drope, 420 U.S. at 180; Pate, 383 U.S. at 378). A denial of either of these rights may provide the basis for habeas relief. See Griffin, 935 F.2d at 930; see also Sheley v. Singletary, 955 F.2d 1434, 1438 (11th Cir. 1992) (stating that incompetence to stand trial and failure to conduct Drope hearing may be alleged as distinct claims).

a.

We first consider whether Weisberg's guilty plea was invalid on the ground that the state trial court erred by failing to conduct a hearing to determine his competence. Trial courts are obligated, either on a defendant's motion or sua sponte, to conduct an evidentiary hearing if there is "sufficient doubt" about the defendant's competence. United States v. Day, 949 F.2d 973, 981 & n.8 (8th Cir. 1991), on remand, 998 F.2d 622, 627 (8th Cir. 1993), cert. denied, 62 U.S.L.W. ___ (U.S. May 31, 1994) (No. 93-6321). "Absent some contrary indication, state and federal trial judges are entitled to presume that defendants are competent." Day, 949 F.2d at

982. Whether the trial court was obligated to conduct a Drope hearing in this case "depends on whether [Weisberg's] mental competency was in question at the time he entered his plea." United States v. Hollis, 718 F.2d 277, 280 (8th Cir. 1983) (affirming district court's denial of motion to withdraw guilty plea where defendant relied on psychiatric report that was submitted after plea and before sentencing), cert. denied, 465 U.S. 1036 (1984). Trial courts should consider facts and circumstances such as evidence of irrational behavior, a defendant's demeanor before the trial court, and any available medical evaluations. Griffin, 935 F.2d at 930.

In this case, no person present at the 1989 plea proceeding -- not the trial judge, not the prosecutor, and not Weisberg's counsel -- indicated that Weisberg's competence should be doubted. After reviewing the plea transcript, we see no reason for doubt. Weisberg signed a plea petition prior to the plea proceeding, stated at the plea proceeding that he had discussed the matter with counsel, and answered all questions to the court's satisfaction. When the issue was first raised at the initial sentencing hearing, the state trial court explicitly stated that it did not doubt Weisberg's competence. Even so, it extended an opportunity to Weisberg's counsel to have his client tested and to present evidence on the issue. When the sentencing hearing reconvened and the court called counsel's attention to why it had been continued, Weisberg offered no evidence bearing on his competence. We believe that the facts and circumstances known to the trial court at the time of Weisberg's guilty plea do not raise a "sufficient doubt" that Weisberg was competent to plead guilty. The information contained in the presentence investigation report was not substantial enough to alter the trial court's findings. Thus, the state trial court did not err when it did not conduct a Drope hearing.

b.

We next consider whether Weisberg's guilty plea was invalid on the ground that, despite the lack of a competency hearing and contemporaneous findings, he actually was incompetent at the time of his plea. The magistrate judge granted relief on this ground, essentially finding that Weisberg's statements during the plea and the evidence introduced during the state-court postconviction proceedings demonstrate that Weisberg was in fact incompetent when he told the court he was guilty of sports bookmaking.

A defendant is competent if he "has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" Godinez, 113 S. Ct. at 2685 (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam)). The magistrate judge relied on several parts of the record to determine that Weisberg was incompetent. He reached his conclusions primarily by analyzing Weisberg's testimony at the plea proceeding. At one point, Weisberg answered the question, "Do you have any children?" with the answer, "Never been married." (Appellant's App. at B42.) The magistrate judge reasoned that this "testimony revealed that he was apparently unaware of the basic biological fact that it is possible to have children without being married." (Report & Recommendation at 21.) We think it is more likely that Weisberg, like those of his generation, believed that marriage normally precedes fatherhood and that his response, phrased as it was, would sufficiently answer the question. We do not believe that Weisberg's answer to this question tends to prove incompetence. The magistrate judge also questioned Weisberg's testimony that he was educated in "special" schools because he needed to be employed. The magistrate judge said that "in actuality" Weisberg went to special schools because he had been deemed "feebleminded," that Weisberg's answer was a "rationalization," and that Weisberg had a "lack of insight"

into the reasons why he went to special schools. (Id.) Although the 1939 probate court judgment shows that Weisberg had been deemed "feebleminded," the magistrate judge did not explain, and the record does not reveal, how Weisberg's answer was unresponsive or how it demonstrates incompetence. The magistrate judge also referred to Weisberg's "confused responses" to questions asked of him during the plea proceeding. Only once during the plea proceeding did a questioner feel the need to rephrase a question, and that was upon Weisberg's request; Weisberg asked the prosecutor to clarify whether the prosecutor meant five bets during the entire period charged in the complaint or five bets per day. As we read the transcript, Weisberg demonstrated an admirable desire for precision in the prosecutor's questions. Even if the purported confusion were to be blamed on Weisberg, our experience is that some confusion about a question is not uncommon between a lawyer and an adverse witness and certainly is not convincing evidence of incompetence. Indeed, if Weisberg's testimony during his plea proceeding were as amiss as the magistrate judge characterized it, someone surely would have been alarmed. See Drope, 420 U.S. at 176-77 ("judges must depend to some extent on counsel to bring issues into focus"). Thus, we believe that Weisberg's testimony at the plea proceeding does not tend to prove that he was incompetent.

The magistrate judge also relied on documentary evidence Weisberg introduced in support of his postconviction motion. An October 4, 1939, probate court judgment stated that Weisberg was "feebleminded because of inability to make normal progress in school." (Appellant's App. at B27.) It hardly need be said that this document has negligible relevance to the question whether Weisberg was competent to enter a guilty plea fifty years later on June 19, 1989, after a lifetime of living and working in the city. The magistrate judge also relied on the jury's verdict in the second prosecution that

Weisberg was not guilty of the charges contained in the second complaint because of mental deficiency. The weight of this evidence also is weakened by the fact that it followed Weisberg's guilty plea by a significant period of time. See Dusky, 362 U.S. at 403 (noting "difficulties of retrospectively determining the petitioner's competency as of more than a year ago"). Furthermore, the jury's finding does not necessarily mean that Weisberg was incompetent to plead guilty because the two inquiries are governed by different legal standards. Cf. United States v. Veltman, 9 F.3d 718, 722 (8th Cir. 1993) (holding that person committed for treatment of mental disease or defect was nonetheless competent to waive right to counsel), cert. denied, 114 S. Ct. 1572 (1994). The magistrate judge also relied on the psychologist's letter, but the psychologist did not conclude that Weisberg was incompetent. In one part of the letter, the psychologist said that Weisberg "does not see why his situation is any different from society's legalized gambling, [] does not see why he should be singled out-for punishment [but] does recognize that he is regarded as an offender by the law, as has been the case in previous convictions for gambling activities . . . ." (Appellant's App. at B33.) We do not construe this statement to indicate that Weisberg did not have a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'" Godinez, 113 S. Ct. at 2687 (quoting Dusky, 362 U.S. at 402). Rather, we believe that this part of the letter more likely indicates that Weisberg simply chose to defy the law because he disagreed with it. This was the view of the state trial court, which had the advantage of observing Weisberg at the time of the plea. Disagreement, however, does not imply incompetence.

As the petitioner in a habeas action, Weisberg carries the burden of persuasion. See Kramer v. Kemna, No. 93-2704, slip op. at 4 (8th Cir. Apr. 13, 1994). To carry his burden, Weisberg must either overcome the presumption that the state

courts' findings of competence are correct, see 28 U.S.C. § 2254 (d); Sumner v. Mata, 449 U.S. 539, 550 (1981), or establish that the state courts' findings of competence are not fairly supported by the record, see 28 U.S.C. § 2254(d)(8); Marshall v. Lonberger, 459 U.S. 422, 432 (1983); Williams v. Armontrout, 912 F.2d 924, 930 (8th Cir. 1990) (en banc) (stating that petitioner bears burden of establishing that record does not support state courts' findings), cert. denied, 498 U.S. 1127 (1991), and 113 S. Ct. 1613 (1993). The magistrate judge determined that the state courts' findings in this case, as evidenced by the Minnesota Court of Appeals' decision, were not supported by the record and thus were not entitled to a presumption of correctness. However, the presumption of correctness "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." Lonberger, 459 U.S. at 432. Here, the state courts' findings of competence were supported by Weisberg's plea petition, the transcript of Weisberg's testimony at his plea proceeding, the state trial court's on-the-record statements that he did not doubt Weisberg's competence, and the Minnesota Court of Appeals' opinion that the state trial court's denial of Weisberg's postconviction motion was proper. We thus disagree with the magistrate judge's determination that the state courts' findings were not fairly supported by the record.

Retrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored. Such determinations have "inherent difficulties" even "under the most favorable circumstances." Drope, 420 U.S. at 183; cf. Day, 949 F.2d at 982 n.9 ("To require a sentencing court [upon a collateral attack to a prior conviction] to decide whether a defendant was competent during proceedings that took place years earlier would be an exercise in futility."). Weisberg's task was more difficult than

usual because he did not testify and because he did not introduce the testimony of any person who could testify that he was incompetent on June 19, 1989. Thus, after carefully reviewing the record, we conclude that Weisberg has failed to prove that he was incompetent when he entered his guilty plea. The district court's ultimate finding on this issue was clearly erroneous.

2.

We next consider whether Weisberg's guilty plea was invalid on the ground that, despite his competence, he did not in fact make a knowing and voluntary plea. To prove that his plea was not a knowing and voluntary plea, Weisberg must show that he did not make "a voluntary and intelligent choice among the alternative courses of action." Schone v. Purkett, 15 F.3d 785, 788-89 (8th Cir. 1994) (internal quotations omitted).

Weisberg has not presented any evidence that he did not understand the nature of the plea proceeding or that he entered his plea involuntarily. Only the letter from the psychologist, which paraphrases some statements Weisberg made to the psychologist after his plea, bears remotely on this issue. As we have explained above, the letter is ambivalent and thus unpersuasive. The plea and sentencing transcripts contain ample evidence that Weisberg understood the consequences of his guilty plea and that he entered it voluntarily. See Brown v. Armontrout, 898 F.2d 84, 87 (8th Cir.) (affirming denial of habeas relief because plea transcript showed that plea was knowing and voluntary), cert. denied, 498 U.S. 868 (1990).

Furthermore, Weisberg introduced no evidence that his decision to plead guilty was based on and caused by the complaint's failure to allege the intentional element of the charged offense. Weisberg's case thus differs from Henderson

v. Morgan, 426 U.S. 637 (1976), where the habeas petitioner "testified that he would not have pleaded guilty if he had known that an intent to cause the death of his victim was an element of the offense," id. at 643-44, and where the district court also heard the testimony of the two lawyers who had represented him at trial, the prosecutor, and the habeas petitioner's mother, id. at 639-40.

Weisberg also argued to the district court that his plea was invalid because his "plea was entered to save [his brother] from prosecution." (Memo. in Support of Pet. at 10 (citing United States v. Cammisano, 599 F.2d 851 (8th Cir. 1979)). The interrelationship between Weisberg's case and his brother's case was fully disclosed; Weisberg's plea petition stated, "I have been told by my attorney and understand that . . . the prosecuting attorney agreed that if I entered a plea of guilty, . . . the case against [my brother] will be dismissed." (Appellant's App. at B51.) Such a condition is not invalid per se but is merely one factor a court should consider when determining whether a guilty plea is voluntary. See Bordenkircher v. Hayes, 434 U.S. 357, 364 n.8 (1978) (noting that promises of lenient treatment for other defendants "might pose a greater danger of inducing a false guilty plea"). Although Weisberg had stated at the sentencing hearing that he believed the State did not have sufficient evidence to convict his brother, he presented no evidence to support the argument that he felt coerced to plead guilty for this reason. Cf. Cammisano, 599 F.2d at 856-57 (reversing denial of motion to withdraw plea because of "the combination of the trial court's noncompliance with [Federal] Rule [of Criminal Procedure] 11, the court's statements made to counsel before the defendant entered his plea and the evidence of familial coercion"). The plea petition, as a whole, appears to represent a good bargain for Weisberg because it also included a provision that the prosecutor would recommend that no jail time and no fine be imposed. (Appellant's App. at B51.) Thus,

Weisberg has failed to prove that his guilty plea was not knowing and voluntary.

In sum, we are satisfied that Weisberg had "the capacity to understand the proceedings and to assist counsel." Godinez, 113 S. Ct. at 2688. Thus, he is not entitled to relief on his first claim because he has not proved that his guilty plea was invalid.

B.

Weisberg also alleged, "The complaint failed to state essential elements of [the] offense in violation of due process." (Appellant's App. at A6.) Specifically, Weisberg argues that the complaint was insufficient because it said only that he "did wrongfully [and] unlawfully engage in sports bookmaking," (id. at B16), and did not include the word "intentionally," as required by the statute creating the offense, see Minn. Stat. § 609.75, subd. 7.

As a general rule, "[a] defendant's knowing and intelligent guilty plea forecloses 'independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" United States v. Vaughan, 13 F.3d 1186, 1187 (8th Cir.) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)), cert. denied, 62 U.S.L.W. 3755 (U.S. May 16, 1994) (No. 93-8607). There are exceptions to this rule, however; a person may, despite a valid guilty plea, pursue a certain type of claim that has been variously defined as a claim that attacks "the State's power to bring any indictment at all," United States v. Broce, 488 U.S. 563, 575 (1989), that protects a defendant's "right not to be haled into court," Blackledge v. Perry, 417 U.S. 21, 30 (1974), and that "the charge is one which the State may not constitutionally prosecute," Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam). We have often interpreted these Supreme Court cases to foreclose claims that raise "nonjurisdictional" issues

and to permit only claims that question the trial court's "jurisdiction." See, e.g., Vaughan, 13 F. 3d at 1188 (holding that guilty plea forecloses double jeopardy claim unless breach of prior plea agreement is "apparent 'on the face of the record'"); United States v. Stewart, 972 F.2d 216, 217-18 (8th Cir. 1992) (holding that guilty plea forecloses Fourth Amendment claim); Smith v. United States, 876 F.2d 655, 657 (8th Cir.) (holding that guilty plea forecloses Fourth Amendment claim and self-incrimination claim), cert. denied, 493 U.S. 869 (1989); Sodders v. Parratt, 693 F.2d 811, 812 (8th Cir. 1982) (holding that guilty plea does not foreclose attack on constitutionality of criminal statute under which defendant was charged); Camp v. United States, 587 F. 2d 397, 399 (8th Cir. 1978) (holding that guilty plea forecloses allegation of violation of Interstate Agreement on Detainers); Perry v. United States, 576 F.2d 158, 159 (8th Cir.) (holding that attack on "the sufficiency of the indictment was waived by [Perry's] plea of guilty"), cert. denied, 439 U.S. 855 (1978); cf. O'Leary v. United States, 856 F.2d 1142, 1143 (8th Cir. 1988) (holding that guilty plea does not foreclose attack on sufficiency of indictment) (citing United States v. Di Fonzo, 603 F.2d 1260, 1263 (7th Cir. 1979) ("a defendant who has pleaded guilty must show that the words and allegations of the indictment on its face failed to state an offense"), cert. denied, 444 U.S. 1018 (1980)).

We have determined that Weisberg's guilty plea is valid. Thus, Weisberg can assert his second claim, that the criminal complaint was insufficient, only to the extent it challenges the state trial court's jurisdiction. Whether an indictment or criminal complaint is sufficient to confer jurisdiction on a state court is a question of state law. Gray v. Swenson, 430 F.2d 9, 14 (8th Cir. 1970); see also Williams v. Collins, 16 F. 3d 626, 637 (5th Cir. 1994); Hailey v. Dorsey, 580 F. 2d 112, 116 (4th Cir. 1978), cert. denied, 440 U.S. 937 (1979). Thus, a federal habeas court must either defer to a state-court finding in the

underlying case, see McKay v. Collins, 12 F.3d 66, 68, modified on reh'g on other grounds, 12 F.3d 70 (5th Cir. 1994), or apply state law to the underlying case in the first instance, see id. at 69.

In Minnesota, a trial court has jurisdiction in a criminal action if a person (1) while within the state, commits an offense; (2) while outside the state, aids or abets the commission of a crime within the state; or (3) while outside the state, intentionally causes a result within the state that is criminal. Minn. Stat. § 609.025; State v. Smith, 421 N.W.2d 315, 319 (Minn. 1988). In essence, the statute requires a criminal complaint to allege that a defendant is responsible for some criminal event occurring within Minnesota. If so, the trial court has jurisdiction. See Smith, 421 N.W.2d at 318-21; State v. McCormick, 273 N.W.2d 624, 625-28 (Minn. 1978).

Weisberg does not claim that the complaint and its pages of attachments failed to allege criminal conduct, and he does not claim that he is not the person identified in the criminal complaint, and he does not claim that the allegations to which he pled guilty occurred outside of Minnesota. Weisberg simply wishes to take advantage of an alleged technical defect in the complaint, i.e., the lack of the word "intentionally."[1] Such an insufficiency, if proved prior to trial, might have provided a basis for dismissal of the complaint, see State v. Serstock, 402 N.W.2d 514, 518-20 (Minn. 1987), but it could not have deprived the trial court of the power to preside over a criminal action, see Minn. R. Crim. P. 17.06, subd. 4(3) (stating that, following dismissal of complaint, "further

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[1] Weisberg was charged as an aider and abetter, which, under Minn. Stat. § 609.05, subd. 1, requires one to "intentionally" aid another. In his plea petition offered to the state trial judge, Weisberg acknowledged that he had been told by his attorney and that he understood that "a person who participates in a crime by intentionally aiding" another person is just as guilty as one who actually commits it. (Appellant's App. at B61 (emphasis added).)

prosecution shall not be barred" and court may continue to detain defendant pending filing of new or amended complaint); Serstock, 402 N.W.2d at 520. Thus, applying Minnesota law to the present case, we believe that the State had the power to bring an indictment against Weisberg and hale him into court, and that the state trial court had the power to enter a judgment of conviction, regardless of the alleged insufficiency in the complaint. See Blackledge, 417 U.S. at 30 (noting that trial court in Tollett retained power to bring defendant into court because "even a tainted indictment . . . could have been 'cured '").

More importantly, the Minnesota courts have already reviewed Weisberg's attack on the sufficiency of the complaint and have not determined that jurisdiction was lacking. The alleged deficiency Weisberg identified in his habeas petition is the same alleged deficiency he presented to the state courts. The state trial court denied his postconviction motion, and the trial court's ruling was affirmed on appeal. See Weisberg, 473 N.W.2d at 383. We can infer from the Minnesota Court of Appeals' decision that the state trial court had jurisdiction, and we are obligated to adhere to that conclusion. Thus, Weisberg cannot obtain habeas relief on the ground that the complaint failed to state the essential elements of the offense.

In sum, Weisberg is not entitled to relief on his second claim because he has waived all nonjurisdictional claims and cannot prove a jurisdictional claim.

III.

We conclude that Weisberg has failed to prove that his guilty plea was invalid. We also conclude that Weisberg cannot prove that his conviction should be vacated on the ground that the complaint was insufficient. Thus, we reverse the judgment of the district court. On remand, the district court shall deny the petition.

HEANEY, Senior Circuit Judge, dissenting.

I have no alternative but to dissent. Intent is an essential element of the crime of sports bookmaking, and the State failed to allege in the indictment that Max Weisberg had the necessary intent. The failure to allege intent was more than a "technical defect," as the majority maintains; it went to the very heart of the indictment and deprived Weisberg of due process.

The United States Supreme Court has made it clear that where specific intent is an essential element of a crime that intent must be alleged in the indictment. United States v. Russell, 379 U.S. 749, 763-64 (1962). This court has consistently taken the same position. See United States v. Opsta, 659 F.2d 848, 850 (8th Cir. 1981) (failure to allege essential element of criminal intent renders indictment partially defective and requires dismissal); United States v. May, 625 F.2d 186, 190 (8th Cir. 1980) (specific intent is a necessary element that must be alleged in the indictment); United States v. Denmon, 483 F. 2d 1093, 1095 (8th Cir. 1973) (indictment must set forth the essential elements of the offense charged or it is fatally defective). The majority seems to agree with this statement of the law, but holds that (1) by pleading guilty, Weisberg waived his right to challenge the validity of the indictment; and (2) in any event, the State of Minnesota had already decided that Weisberg had waived his right to challenge the validity of the conviction and our court is bound by that decision.

If an essential element of the crime has been omitted from the indictment, the omission may be cured if the indictment sets out the words of the statute itself, but only if "those words of themselves fully, directly, and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. . . . [An] omission is not cured by a bare citation of the charging

statute." United States v. Zangger, 848 F. 2d 923, 925 (8th Cir. 1988) (citations omitted). A "bare citation" to the statute is precisely what we have here.

An objection that an indictment fails to state an essential element of a crime can be raised at any time. See Fed. R. Crim. P. 12(b)(2).[1] See United States v. Wilson, 884 F.2d 174, 179 (5th Cir. 1989) ; United States v. Oberski, 734 F. 2d 1034, 1035 (5th Cir. 1984), cert. denied, 469 U.S. 1113 (1985). While some courts take the position that if the issue is not raised at trial the indictment will be read more liberally, United States v. Campos-Asancio, 822 F.2d 506, 508 (5th Cir. 1987); United States v. Pupo, 841 F.2d 1235, 1239 (4th Cir.), cert. denied, 488 U.S. 842 (1988), this rule is of no avail to the State in this case because on any reading of the indictment, however liberal, the necessary intent element is nowhere to be found. It follows that Weisberg is entitled to habeas relief unless the majority's alternate ground for affirming (e.g., that we are bound by the state court's decision) has merit. In this regard, constitutional rights and jurisdiction are synonymous.

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[1] Fed. R. Crim. P. 12(b)(2) states:

> (b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> . . . .
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings) . . . .

(Emphasis added).

Weisberg had a federal constitutional right to have all essential elements of the crime charged, and he cannot be deprived of that right by a state court.

The Minnesota Supreme Court's view on the necessity of charging intent in an indictment where intent is an essential element of the crime is identical to that of the United States Supreme Court in Russell and this court in Opsta, May, and Denmon, see supra. Chief Judge Amdahl of the Minnesota Supreme Court in the seminal case State v. Serstock, made clear that "[t]he indictment must contain the elements of the offense charged," and that failure to do so must result in a dismissal. 402 N.W.2d 514, 518 (Minn. 1987) ; see also State v. Oman, 121 N.W.2d 616, 620 (Minn. 1963) ("A statement of the essential facts constituting the offense charged is indispensible [sic] to the validity of the indictment."). In no reported case has the court departed from the rules in Serstock and Oman, nor could it because the issue is one of federal constitutional law.

The Minnesota Court of Appeals in the instant case failed plainly and simply to follow Serstock and Oman, Minnesota law on the issue. Even if it had done so, the court's decision could not be permitted to stand because the question is one of federal constitutional law. The court based its decision on the fact that "Weisberg acknowledged in extensive questioning before entering his plea that he knew the charges against him and had discussed these with his attorney." State v. Weisberg, 473 N.W.2d 381, 383 (Minn. App. 1991). While this may be true, it is not a basis for validating an indictment that fails to state the essential elements of an offense. Opsta, 659 F.2d at 805; May, 625 F.2d at 190; Denmon, 483 F.2d at 1095.

With due respect to my colleagues, the cases cited by them fall far short of supporting their position. In Sodders v. Parrott, 693 F.2d 811, 812 (8th Cir. 1982), this court held that an information cannot be challenged after a plea of guilty unless the information fails to charge a crime. The case before

us fits squarely into the Sodders exception. The indictment, by failing to allege intent, an essential element of the crime of sports betting, failed to allege a crime. In Perry v. United States, this court in a per curiam opinion simply restated the rule that a defendant cannot challenge the sufficiency of an indictment after entering a plea of guilty in contrast to a defendant's ability to challenge an indictment where the indictment fails to allege an essential element of the offense. 576 F.2d 158, 159 (8th Cir.), cert. denied, 439 U.S. 855 (1978). We reaffirmed this point in O'Leary v. United States when we stated that "[i]n order to establish a jurisdictional defect, [a defendant] must show that the indictment on its face fails to state an offense." 856 F.2d 1142, 1143 (8th Cir. 1988). O'Leary makes clear that an indictment that on its face fails to state an offense establishes a jurisdictional defect. In this case, we have a jurisdictional defect.

I take issue as well with the majority's application of Gray v. Swenson, 430 F.2d 9, 14 (8th Cir. 1970), Williams v. Collins, 16 F.3d 626, 637 (5th Cir. 1994), and Hailey v. Dorsey, 580 F.2d 112, 116 (4th Cir. 1978), cert. denied, 440 U.S. 937 (1979). These cases simply hold that the sufficiency of a state indictment may be grounds on which to base federal habeas relief only when the convicting court is without jurisdiction (e.g., when the indictment fails to allege the essential elements of the crime). The majority can take some comfort in McKay v. Collins, 12 F.3d 66, 68, (5th Cir. 1994), but even there the court states that "[t]he sufficiency of a state indictment is not a matter for federal habeas relief unless it can be shown that the indictment is so defective that it deprives the state court of jurisdiction."

I would affirm the district court's decision to grant the petitioner the writ of habeas corpus.[2]

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[2] In light of my view that the indictment in this case is defective, it is not necessary for me to reach the other issues raised by the majority.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Max Weisberg, Civil No. 4-92-300

Petitioner,

v. **ORDER**

State of Minnesota,

Respondent.

This matter is before the court upon respondent State of Minnesota's objections to a Report and Recommendation of United States Magistrate Judge Floyd E. Boline dated January 19, 1993. Respondent objects to the magistrate judge's recommendation that petitioner Max Weisberg's "application for writ of habeas corpus [pursuant to 28 U.S.C. § 2254] be granted, and that respondent be directed to forthwith take all appropriate and necessary actions to secure the withdrawal of petitioner's guilty plea, the vacation of his conviction for sports bookmaking, and the dismissal of the complaint dated January 9, 1989."

Based upon a de novo review of the record herein, the court adopts the magistrate judge's Report and Recommendation dated January 19, 1993. Accordingly, **IT IS HEREBY ORDERED** that:

1. Petitioner Max Weisberg's application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is granted;

2. The respondent must secure the withdrawal of the petitioner's guilty plea dated June 19, 1989;

3. The respondent must secure the vacation of the petitioner's conviction for sports bookmaking; and

4. The respondent must secure the dismissal of the complaint against the petitioner issued in January, 1989.

Dated: February 24, 1993

s/s
David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CIVIL 4-92-300

Max Weisberg,

Petitioner,

v. **REPORT AND RECOMMENDATION**

State of Minnesota,

Respondent.

Before the Court is petitioner's application for writ of habeas corpus under 28 U.S.C. § 2254. A hearing was held in this matter on October 19, 1992. Petitioner was represented by Ronald I. Meshbesher, Esquire. Respondent was represented by Assistant Ramsey County Attorney Mark N. Lystig. This matter was referred to the undersigned United States Magistrate Judge for Report and Recommendation under 28 U.S.C. § 636 and D.Minn. Local Rule 72.1. For the following reasons, the undersigned recommends that petitioner's application be granted.

BACKGROUND

On January 9, 1989, petitioner Max Weisberg and his brother, Solly Weisberg, were jointly charged in Ramsey County District Court with one count of Sports Bookmaking. See Complaint, Respondent's Exhibit A, Docket No. 12.

Petitioner accepted a plea agreement and entered a guilty plea to the January 9, 1989 complaint. See Plea Petition and Transcript, Petitioner's Exhibits 6 and 7, Docket No. 11. The state court stayed imposition of sentence and placed petitioner on probation for five years on condition that he remain law abiding and not commit any similar offenses. See Transcript, Petitioner's Exhibit 9.

On May 22, 1990, petitioner was charged in Ramsey County District Court with a second count of Sports Bookmaking. See Second Complaint, Respondent's Exhibit B. Petitioner was acquitted at trial based upon the jury's finding that he was "not guilty . . . by reason of mental deficiency," an issue upon which petitioner had the burden of proof. Verdict, Petitioner's Exhibit 3. The same jury had previously found that "the elements of Sports Bookmaking have been proved beyond a reasonable doubt." Id. at Exhibit 4.

Based upon the jury's verdict that an offense had been proven, respondent State of Minnesota moved for a finding that petitioner had violated the terms of his probation on the January 9, 1989 charge. Petitioner countered with a motion to both vacate the conviction on the first charge and withdraw his guilty plea. See Motion, Affidavit and Exhibits, Petitioner's Exhibit 5. This motion was denied. The trial court then found petitioner had violated his probation, imposed a stayed sentence of imprisonment for 15 months, and again placed petitioner on probation with certain conditions that are not relevant here. See Transcript, Docket No. 14, at 10-11.

Petitioner then appealed to the Minnesota Court of Appeals, which concluded that his probation could not be revoked based upon the disposition in the second case. See State v. Weisberg, 473 N.W.2d 381, 382-83 (Minn.Ct.App. 1991), pet. for rev. denied, (Minn. Oct. 11, 1991) (copy attached to petition, Docket No. 1). The appellate court upheld the denial of petitioner's motion to vacate his conviction and withdraw his guilty plea. Id. at 383-84.

Petitioner then filed this petition for writ of habeas corpus, seeking federal review of the validity of his guilty plea and conviction under 28 U.S.C. § 2254.

DISCUSSION

1. Sufficiency of Complaint

Petitioner first claims that the January 9, 1989 complaint was defective because it failed to allege the essential elements of the offense of sports bookmaking. The Minnesota Court of Appeals rejected this claim and ruled that the elements of the offense "were adequately set forth" and "the alleged defects in the complaint did not cause manifest injustice or prejudice." Weisberg, 473 N.W.2d at 383. The state appellate court cited and relied upon the "extensive questioning" of petitioner before he entered his plea, which it apparently regarded as having eliminating the possibility of prejudice from any defect in the complaint. Id. (citing State v. Serstock, 402 N.W.2d 514, 519 n.5 (Minn. 1987)).

Every criminal defendant has the right "to be informed of the nature and cause of the accusation . . . ." U.S. Const. amend. VI. A charging document[1] fulfills this constitutional

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[1] Federal criminal prosecutions generally proceed by way of indictment rather than complaint. See Rule. 7 (a), Fed. R. Crim. P. Accordingly, much of the constitutional analysis which follows comes from federal cases dealing with sufficiency of indictments. The Court believes this analysis applies equally to state criminal complaints, especially with respect to the basic constitutional requirement that a criminal pleading provide the defendant with adequate notice of the nature and essential elements of the charged offense. See United States v. Hetzel, 385 F.Supp. 1311, 1315 (W.D.Mo. 1974) (dismissing federal information for failure to allege criminal intent). While petitioner has cast his challenge to the complaint in terms of Fifth Amendment due process rather than the Sixth Amendment, the same minimal

requirement if it "contains the elements of the offense intended to be charged, land sufficiently apprises the defendant of what he must be prepared to meet . . . ." United States v. Russell, 369 U.S. 749, 763 (1962) (citations omitted); see also United States v. Zangger, 848 F. 2d 923, 925 (8th Cir. 1988) (same). In Hamling v. United States, 418 U.S. 87 (1974), the Supreme Court stated that:

> our prior cases indicate that an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. Hagner v. United States, 285 U.S. 427 (1932); United States v. Debrow, 346 U.S. 374 (1953).

Id. at 117 (emphasis added); see also United States v. Helmel, 769 F.2d 1306, 1322 (8th Cir. 1985); United States v. Davis, 592 F.2d 1325, 1328 (5th Cir.) cert. denied, 442 U.S. 946 (1979); United States v. Cartano, 534 F.2d 788, 791 (8th Cir.), cert. denied, 429 U.S. 843 (1976).

Conversely, a charging document is defective if it "fails to allege elements of scienter[2] that are expressly contained in the statute that describes the offense." United States v. Pupo, 841

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constitutional requirements for criminal pleadings would seem to flow from both amendments. See United States v. Wilson, 884 F. 2d 174, 179 and n. 8 (5th Cir. 1989). The requirements set forth in the Fifth and Sixth Amendments are applicable to the States. U.S. Const. amend. XIV.

[2] Scienter is a latin word which means "knowingly" and is "frequently used to signify a defendant's guilty knowledge." Black's Law Dictionary 1345 (6th ed. 1990). Scienter is an element of a crime where the statute uses one or more of such terms such as "intentional," "willful," "knowing," "fraudulent" or "malicious." Morissette v. United States, 342 U.S. 246, 264 (1951).

F.2d 1235, 1239 (4th Cir.), cert. denied, 488 U.S. 842 (1988) (citing Hagner v. United States, 285 U.S. 427 (1932); see also United States v. Opsta, 659 F.2d 848, 850 (8th Cir. 1981) (failure to allege essential element of criminal intent makes an indictment fatally defective and requires dismissal); United States v. Denmon, 483 F.2d 1093, 1095 (8th Cir. 1973) (same). An indictment which fails to expressly allege criminal intent may nevertheless be sufficient "if its wording parallels the statute." United States v. Williams, 923 F.2d 76, 77 (8th Cir.), cert. denied, 112 S.Ct. 131 (1991) (quoting United States v. Love, 815 F.2d 53, 55 (8th Cir.), cert. denied, 484 U.S. 861 (1987)). An indictment need not plead scienter in the precise terms used in the statute "so long as other words or facts contained in the indictment 'necessarily or fairly import guilty knowledge.'" United States v. McLennan, 672 F.2d 239, 242 (1st Cir. 1982) (quoting Madsen v. United States, 165 F.2d 507, 509-10 (10th Cir. 1947)); see also United States v. Artega-Limones, 529 F.2d 1183, 1199-1200 (5th Cir.), cert. denied, 429 U.S. 920 (1976) (language of indictment, which included reference to statute, and jury instruction on element of intent prevented injustice to defendant); compare Opsta, 659 F.2d at 850 (defective indictment cannot be cured by proper jury instructions on criminal intent). Where criminal intent is an essential element of an offense, the failure of a pleading to allege intent is a matter of substance, not of mere form. Denmon, 483 F.2d at 1096; Hetzell, 385 F.Supp. at 1315.

An indictment that only cites the applicable statute is fatally defective. See Zangger, 848 F.2d at 925; Pupo, 841 F.2d at 1239 (citing cases); McLennan, 672 F.2d at 243; see also United States v. Wabaunsee, 528 F.2d 1, 3-4 (7th Cir. 1975) (omission of essential element is fatal to indictment and cannot be cured by reference to the statute); United States v. Berlin, 472 F.2d 1002, 1008 (2d Cir.), cert. denied, 412 U.S. 949 (1973) (same); but see United States v. Stefan, 784 F.2d

1093, 1101-02 (11th Cir. 1986) (where statute is cited, statutory language may be used to determine whether defendant received adequate notice); United States v. Chilcote, 724 F.2d 1498, 1505 (11th Cir.), cert. denied, 467 U.S. 1218 (1984) (same). Similarly, the use of the word "unlawfully" in an indictment, without more, is insufficient to allege felonious intent. See United States v. Carll, 105 U.S. 611, 612-13 (1881); McLennan, 672 F. 2d at 242 (discussing Hughes v. United States, 338 F. 2d 651, 652 (1st Cir. 1964)); United States v. May, 625 F.2d 186, 189-90 (8th Cir. 1980).

Where a defendant does not challenge the sufficiency of an indictment until after conviction, the indictment will be read liberally and its validity upheld unless it is so defective that it "does not, by any reasonable construction, charge an offense for which the defendant is convicted." United States v. Wilson, 884 F.2d 174, 179 (5th Cir. 1989) (quoting United States v. Trollinger, 415 F.2d 527, 528 (5th Cir. 1969) (per curiam)); see also Wabaunsee, 528 F.2d at 2 (same). After conviction a defendant may not obtain relief based upon formal or technical defects in an indictment absent a showing of prejudice. See Hagner v. United States, 285 U.S. 427, 431 (1932); Cartano, 534 F.2d at 791.

In this case the complaint alleged in relevant part as follows:

> **WHEREFORE,** your complainant alleges that the defendants between November 13, 1988 and December 4, 1988 in Ramsey County, aiding and abetting and being aided and abetted by each other did wrongfully, unlawfully,
>
> engage in sports bookmaking,
>
> Said acts constituting the offense of:

SPORTS BOOKMAKING

in violation of Minnesota Statutes:

609.75, subd.7; 609.03 and 609.05

Respondent's Exhibit A, Docket No. 12 (emphasis added).[3]

Petitioner contends the complaint is defective because it contains no allegation that he acted "intentionally," as set forth in the statutory definition of "Sports Bookmaking." See Memorandum in Support, Docket No. 2, at 1-4 (citing Minn. Stat. § 609.75, Subd. 7 (1988)). Respondent counters this claim by arguing that: (1) the Minnesota Court of Appeals ruled that "the elements of the offense were adequately set forth" and rejected petitioner's challenge to the sufficiency of the complaint, and (2) petitioner has not demonstrated that he was misled or prejudiced by the complaint. Answer, Docket No. 6, at 6 (quoting State v. Weisberg, 473 N.W.2d at 383)). This Court finds that respondent's arguments wholly fail to meet the claim advanced by petitioner.

First, the historical fact that the state courts upheld the sufficiency of the complaint is essentially irrelevant to this federal habeas corpus proceeding. With all due respect to the state courts, this Court must independently determine questions of law, such as whether the complaint in this case satisfies the minimal constitutional standards set forth above. See Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Jones v. Jones, 938 F.2d 838, 842 (8th Cir. 1991). Respondent's argument misapprehends the nature of federal habeas corpus

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[3] The portions underlined by the Court were typed onto a printed complaint form; the remainder of the quoted language is from the form complaint. Some of the form language was stricken out by the person who drafted the complaint, leaving the text which has been quoted by the Court.

review, which would be rendered a mere nullity if legal conclusions by the state courts could be urged in federal court as a basis for denying relief.

Secondly, by focusing solely on an alleged lack of prejudice, respondent has completely failed to address the merits of petitioner's claim that the complaint was constitutionally defective for failure to allege the essential element of criminal intent. Respondent has neither asserted that intent is not an essential element of the offense, nor pointed to any language in the complaint or elsewhere that could be construed to allege criminal intent. Thus, petitioner's claim - that intent is an essential element of the offense of sports bookmaking that was omitted from the complaint - stands unrebutted.

Even if respondent had answered petitioner's claim on its merits, this Court would still conclude that the complaint is fatally defective. The state's charging theory was that petitioner and his brother aided and abetted each other to engage in sports bookmaking. The complaint cited Minnesota's aiding and abetting statute, which provides that:

> A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.

Minn. Stat. § 609.05, Subdivision 1 (1988) (emphasis added). The complaint also cited a statute which defines "sports bookmaking:"

> Sports bookmaking is the activity of intentionally receiving, recording or forwarding within any 30 day period more than five bets, or offers to bet, that total more than $2,500 on any one or more sporting events.

Minn. Stat. § 609.75, Subd. 7 (1988) (emphasis added). Both of these statutes expressly require that acts be done "intentionally" before any criminal liability will attach.[4] The Court therefore concludes that scienter, or criminal intent, is an essential element of the offense which was intended to be charged.

The complaint, however, did not include any allegation that petitioner acted "intentionally" or with any other variety of scienter. Nor can the allegation (on the printed form) that petitioner acted "wrongfully" or "unlawfully" be construed as an allegation of criminal intent. See Carll, 105 U.S. at 612-13; McLennan, 672 F.2d at 242; Hughes, 338 F.2d at 652. Moreover, the reference in the complaint to various statutes will not serve to supply a missing element of intent. See Zangger, 848 F.2d at 925; Pupo, 841 F.2d at 1239; McLennan, 672 F.2d at 243; Wabaunsee, 528 F.2d at 3-4; Berlin, 472 F.2d at 1008. Lastly, the 66 pages of police reports attached to the complaint are properly viewed as factual information related to the issue of whether there was probable cause to believe that defendant's conduct fell within the offense sought to be charged, and not to the separate legal question of whether the complaint alleged the essential elements of that offense. Indeed, the complaint states as much on its face. See Complaint, Respondent's Exhibit A, Docket No. 12, at 1 ("the information contained in the attached exhibits, consisting of 66 pages, is true and correct and establishes probable cause . . . ."). The question of whether a criminal pleading alleged the elements of an offense is analyzed separately from the question of whether the pleading also informed the defendant of the acts he allegedly committed, i.e. the factual basis underlying the charge. See Hamling, 418 U.S. at 117; Serstock, 402 N.W.2d at 518.

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[4] The third statute cited in the complaint is a penalty provision. See Minn. Stat. § 609.03 (1988).

This Court concludes that since the January 9, 1989 complaint does not allege the essential element of criminal intent, it is fatally defective and petitioner's conviction cannot stand. See Zangger, 848 F.2d at 925; Opsta, 659 F.2d at 850; Hetzel, 385 F.Supp. at 1315.

The Court's conclusion that the complaint is fatally defective finds further support in another argument which is obvious from the face of the complaint.[5] The statute cited in the complaint, Minn. Stat. § 609.75, Subd. 7, is a definitional statute, and is not itself a criminal statute. Section 609.75 only defines the term "sports bookmaking" and nothing in that statute can be construed to criminalize the defined activity. The crime of "sports bookmaking" is actually set forth in a separate statute, which provides as follows:

> **Felony Gambling.** Whoever engages in sports bookmaking is guilty of a felony.

Minn. Stat. § 609.76, Subd. 2 (1988) (bold emphasis original). This statute is not cited in the complaint. Accordingly, not only is the complaint fatally defective for

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[5] It does not appear from the record that petitioner raised this specific argument in these proceedings or in state court, but the Court believes the argument is fairly subsumed within his general claim that the complaint is deficient for failure to allege the essential elements of sports bookmaking. See Motion to Vacate, Petitioner's Exhibit 5, Docket No. 11. The argument that the complaint failed to allege a crime amounts to another reason for sustaining that claim, rather than a separate claim. Further, it would be futile to require petitioner to present this argument to the state courts in light of the ruling by the Minnesota Court of Appeals that the complaint was sufficient. See Weisberg, 473 N.W.2d at 383. Thus, the Court has considered the argument without requiring petitioner to first present it to the state courts.

failing to allege criminal intent, but for failing to allege any crime whatsoever.[6]

To the extent it is necessary, the Court also finds, based upon the discussion which follows concerning petitioner's lack of competence, that he has made an adequate showing of prejudice from these defects in the complaint. See infra at 15-26; see also Petitioner's Memorandum, Docket No. 2, at 2-4 (discussing the effect of the defective pleading on petitioner's ability to understand the charge).

The Court concludes that the complaint is fatally defective for failure to allege the essential elements of the offense of sports bookmaking. It follows that petitioner is entitled to habeas corpus relief, to include the vacating of his conviction, withdrawal of his guilty plea, and dismissal of the complaint.

2. Petitioner's Competence to Enter a Guilty Plea

Petitioner also contends his June 19, 1989 guilty plea was not voluntary and intelligent because he was mentally deficient, and therefore not competent to enter a guilty plea. The Court will now address the merits of petitioner's claim of mental deficiency, as it constitutes an alternative ground for granting his application for writ of habeas corpus.

To be valid, a guilty plea must represent a voluntary and intelligent choice among the alternatives available to the defendant. North Carolina v. Alford, 400 U.S. 25, 31 (1970). The record of the plea proceeding must "affirmatively disclose that a defendant who pleaded guilty entered his plea

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[6] Equally, petitioner could not be convicted for "aiding and abetting" his brother unless the complaint charged that the object of their joint conduct was the commission of a crime, i.e., a violation of Minn. Stat. § 609.76, Subd. 2, rather than the definitional statute, Minn. Stat. § 609.75, Subd. 7. See Minn. Stat. § 609.05. The complaint did not so charge.

understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747 n. 4 (1970). Where a defendant was represented by competent counsel and had a full and fair guilty plea hearing, he carries a heavy burden to set aside his guilty plea. Clark v. Solem, 693 F.2d 59, 62 (8th Cir. 1982), cert. denied, 460 U.S. 1090 (1983). A defendant's statements in connection with a guilty plea "carry a strong presumption of verity and pose a 'formidable barrier in any subsequent collateral proceedings.'" Voytik v. United States, 778 F.2d 1306, 1308 (8th Cir. 1985) (quoting Blackledge v. Allison, 431 U.S. 63, 73 (1977)).

Factual findings made by a state court in connection with a guilty plea are entitled to a statutory presumption of correctness. See 28 U.S.C. § 2254(d) ; Sumner v. Mata, 449 U.S. 539, 544-47 (1981); Crespo v. Armontrout, 818 F.2d 684, 686 (8th Cir.), cert. denied, 484 U.S. 978 (1987). As was stated in Blair v. Armontrout, 916 F.2d 1310 (8th Cir. 1990), cert. denied, 112 S.Ct. 89 (1991):

> Federal courts must presume that state court factual determinations are correct unless the applicant can either establish the existence of one of seven conditions, § 2254(d) (1-7), or show that state court determinations are "not fairly supported by the record," § 2254 (d) (8). If the applicant is unable to establish either alternative, "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Id. at 1317-18 (citations omitted); see also Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam) (state court's factual findings may not be rejected unless they are not fairly supported by the record); Marshall v. Lonberger, 459 U.S. 422, 432 (1983) (same). The presumption of correctness

applies whether the finding was made by a state trial or appellate court. Sumner, 449 U.S. at 547. To fall within the presumption, a state court determination must have been made after a hearing on the merits and be evidenced by "a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C. § 2254(d); Sumner, 449 U.S. at 546-47. The presumption does not apply to a state court's oral rulings, as opposed to written findings. Jones, 938 F.2d at 842.

This Court will proceed under the assumption that the issue of whether a defendant was mentally competent to enter a guilty plea is a question of fact.[7] See Maggio, 462 U.S. at 117 (state court finding that evidence did not warrant competency evaluation treated as a question of fact). A state court's written finding that a defendant was competent is therefore entitled to a presumption of correctness under § 2254 (d). Id. Any related credibility findings by state courts are also entitled to a presumption of correctness. Ingrassia v. Armontrout, 902 F.2d 1368, 1370 (8th Cir. 1990); see also Miller, 474 U.S. at 114 (credibility determinations entitled to presumptive weight); Maggio, 462 U.S. at 113, 118 (same).

The ultimate question of whether a guilty plea was voluntary and intelligent is one of law, which must be independently determined by a federal habeas court without deference to previous decisions by state courts. Woods v. Armontrout, 787 F.2d 310, 317 (8th Cir. 1986), cert. denied, 479 U.S. 1036 (1987) (citing Miller v. Fenton, 474 U.S. 104 (1985)); see also Lonberger, 459 U.S. at 431 (voluntariness of guilty plea is a question of federal law).

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[7] A minority of the Maggio court described the issue of competence as a "mixed" question of law and fact, which is fully reviewable by a federal court and not entitled to a presumption of correctness. See Maggio, 462 U.S. at 118-121; see also Sumner v. Mata, 455 U.S. 591 (1982) (discussing "mixed" questions); Matusiak v. Kelly, 786 F.2d 536, 543 (2d Cir.), cert. denied, 479 U.S. 805 (1986) (competency is a mixed question of fact and law).

In this case the question of petitioner's competence was first raised at a September 28, 1989 sentencing hearing, which took place after petitioner's guilty plea had already been accepted by the state trial court.[8] When petitioner's counsel received the presentence investigation report[9] he learned for the first time that petitioner was committed as "feebleminded" in 1939. See Transcript, Petitioner's Exhibit 8, Docket No. 11, at 2-3. The probation officer had also reported to the court that petitioner did "not in any manner or form look upon the instant offense as a misdeed or violation of the law." Id. at 5, 9. Counsel then moved to withdraw the guilty plea on the grounds that petitioner was incompetent. Id. at 2-3. The state court orally stated that petitioner "was aware of what was going on" at the guilty plea hearing and "did understand the nature of what was occurring at least on that date." Id. at 4-5. The court was concerned by petitioner's candid statements to the probation officer that he did not intend to stop bookmaking, and the court stated that it "could hardly see how anybody that is really very smart would make certain statements as he made specifically for the record." Id. at 5. The court also stated that it was inclined to deny the motion to withdraw, but granted a thirty day continuance to allow counsel an opportunity to have petitioner tested. Id. at 4-5, 8-12.

For reasons which do not appear in the record, the question of petitioner's competence was neither mentioned nor resolved at his sentencing on November 16, 1989. See Transcript, Petitioner's Exhibit 9, Docket No. 11. Imposition of sentence was stayed and petitioner was placed on probation

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[8] Petitioner was represented by attorney Steven Meshbesher at the time he entered his guilty plea, but was represented at all subsequent proceedings by his current attorney, Ronald Meshbesher.

[9] This report is not contained in the record.

for five years on the condition that he "remain law-abiding and have no same or similar violations." Id. at 9.

After petitioner was acquitted on a second charge of sports bookmaking by reason of a jury verdict that he was mentally deficient, the state moved for a finding that he had violated his probation on the first offense. See Transcript, Docket No. 14, at 2-3. Petitioner then moved to set aside his guilty plea on the grounds that he was mentally deficient at the time of the plea. See Motion, Petitioner's Exhibit 5, Docket No. 11. Petitioner's motion was supported by the jury verdict in the second prosecution; an affidavit of defense counsel; a copy of the 1939 judgment of the probate court committing petitioner as "feebleminded;" and a written report from Dr. Kenneth A. Perkins, Ph.D., a psychologist. Dr. Perkins had examined petitioner and concluded he was "mildly mentally retarded" and "clearly does not understand that his gambling activities are wrong from either a legal or a moral standpoint." Id. The state court denied petitioner's motion in all respects, found that he had violated the terms of his probation, and imposed sentence. See Transcript, Docket No. 14, at 8-11. There is no evidence in the record of any written finding by the state trial court that petitioner was competent.[10]

On appeal, the Minnesota Court of Appeals addressed the issue of petitioner's competence as follows:

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[10] In an Order dated November 25, 1992, this Court noted that the record did not contain either the transcript of the January 18, 1991 probation violation hearing or any related order issued by Judge Cohen. See Order, Docket No. 13. The Court then directed respondent to file a copy of the transcript and any such order. Id. On December 7, 1992, respondent filed a copy of the transcript (which refers to a written order and memorandum), but not the order. See Transcript, Docket No. 14, at 2-3, 7. Any incompleteness in the record is therefore directly attributable to respondent's failure to comply with the November 25, 1992 Order.

> We cannot agree with Weisberg's claim that the jury's finding of mental deficiency on the 1990 charge should have been given collateral estoppel effect on the issue of his competency to plead to the 1989 offense. The jury considered only Weisberg's competency to commit sports bookmaking at the time of the second offense, and its verdict is not dispositive of Weisberg's capacity at an earlier point in time. The evidence supporting incompetency, including commitment records, the jury's recent verdict, and a psychologist's report, is strong but not conclusive.
>
> Weisberg's competency to enter the guilty plea was supported by a comprehensive plea petition drafted by his attorney and a record showing extensive questioning at the time Weisberg entered the plea. The court's determination of Weisberg's competency to plead guilty in 1989 is adequately supported.

Weisberg, 473 N.W.2d at 383 (citations omitted) (emphasis added). This Court will treat the above appellate opinion as a "written finding" that petitioner was competent to enter his guilty plea. See 28 U.S.C. § 2254 (d); Sumner, 449 U. S. at 546-47. This finding is entitled to a statutory presumption of correctness. Id.

The next question is whether this finding of competency was "fairly supported by the record." 28 U.S.C. § 2254(d)(8); Blair, 916 F.2d at 1317. Respondent argues, in a wholly conclusory manner, that the finding of competency was "supported by the record and should not be disturbed." Answer, Docket No. 6, at 5. Respondent also argues that petitioner must have been competent because he had previously been convicted of gambling offenses:

> Petitioner's claim is essentially that the plea could not have been voluntary because he has been mentally deficient since 1939, when his low I.Q. score was first reported. Such a claim carries with it a necessary corollary that all of his earlier convictions are invalid, and that his attorneys, the prosecuting attorneys and the judges in all of those earlier cases were-too incompetent to recognize that petitioner is so mentally deficient as to be incapable of intelligently and voluntarily entering pleas or understanding the charges against him. Merely stating the proposition is to recognize its lack of merit.

Id. at 4. Respondent has again missed the mark by failing to explain how the appellate court's finding of competence is fairly supported by the record. It seems reasonable to assume that respondent would bring to this Court's attention any statements made by petitioner which demonstrate his competence, but respondent has not undertaken to do so. Moreover, respondent's argument that petitioner must have been competent because he has other convictions is nothing more than an example of the logical fallacy of inverse reasoning. Respondent's arguments are therefore of no assistance to this Court in determining whether the state court's finding of competence is fairly supported by the record.

The Minnesota Court of Appeals relied exclusively upon the plea petition and questioning at the guilty plea hearing as supporting a finding of competence. The eight-page plea petition, prepared by attorney Steven Meshbesher and signed by petitioner, contains the following typed recitations:

> 2. I have received, read and discussed with my attorney a copy of the Complaint.

3. I understand the charge made against me in this case.

6. I have been a patient in a mental hospital but am now of sound mind.

7. I have talked with or been treated by a psychiatrist or other person for a nervous or mental condition in the past but am not being treated at this time.

Petition, Petitioner's Exhibit 7, Docket No. 11. The petition also contains various typed recitations to the effect that petitioner understood the various rights he waived by pleading guilty. Id.

Petitioner testified at the guilty plea hearing that he went through each page of the petition with his attorney. Transcript, Petitioner's Exhibit 6, Docket No. 11, at 4. Petitioner attended school through the sixth grade, but had attended mostly "special schools" and he "didn't get a chance to go to regular schools because I was working and had to help my family out." Id. at 5. In response to a leading question from defense counsel, petitioner agreed that he "understood" the plea proceedings. Id. The court accepted the plea petition. Id. at 6.

The prosecutor then questioned petitioner as follows:

Q: And have you ever been married?

A: No, I have not.

Q: Do you have any children?

A: Never been married.

. . .

Q: Have you ever received any treatment for a mental condition?

A: Well, I'm not in good condition right now. I have a lot of trouble. Every couple hours I have to go to the bathroom and I have trouble with my insides, stomach here. I have trouble at night when I go to bed.

Q: Okay.

A: I'm trying to answer these questions.

Q: I understand.

A: Thank you very much.

Q: Have you ever sought the treatment of a psychiatrist or psychologist?

A: Psychiatrist, no.

Q: And you understand what's going on here today, don't you?

A: Yes, I do. I was bookmaking, yes.

Id. at 8-9. After a series of questions from both the prosecutor and defense counsel, which generated confused responses from petitioner, petitioner answered "yes" to the prosecutor's question as to whether he had taken more than $2,500 in bets on sporting events in a three week period. Id. at 9-10. Petitioner then told the court he had a "complaint,"

but the court cut him off and directed him to talk with his attorney. Id. at 10. The court then accepted the guilty plea and set the matter for sentencing. Id.

This Court finds that the plea petition and hearing transcript provide virtually no evidence that petitioner was competent. First, petitioner's testimony revealed that he was apparently unaware of the basic biological fact that it is possible to have children without being married. Similarly, when asked if he had ever been treated for any mental condition, petitioner described only his physical ailments. Petitioner also denied ever having been treated by a psychiatrist, even though the petition he signed expressly stated that he was so treated and had been confined in a mental hospital. Petitioner's lack of insight[11] into his limited mental abilities is further demonstrated by his apparent rationalization that he went to "special" schools only because he had to work and help out his parents, when in actuality he was committed to an institution for the feebleminded at age 15.

Against this background, petitioner's plea petition and his affirmative responses to leading questions as to whether he 'understood' the proceedings were insufficient to "affirmatively disclose that [he] . . . entered his plea understandingly and voluntarily." Brady, 397 U.S. at 747 n. 4. Petitioner's confused and inaccurate responses should have instead alerted the trial court that a competency evaluation was constitutionally required before the plea could be accepted. See Rule 20.01, subd. 1, Minn.R.Crim.P.; Drope v. Missouri, 420 U.S. 162, 172-73 and n.9 (1975); Tiller v. Esposito, 911 F.2d 575, 576 (11th Cir. 1990); Matusiak, 736 F.2d at 545;

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[11] Petitioner's limited understanding of the plea agreement and the offense of sports bookmaking are reflected in his later comments to the court. See Transcript, Petitioner's Exhibit 8, at 7-8, 11; Transcript, Petitioner's Exhibit 9, at 3-5, 7-8.

Rinehart v. Brewer, 561 F.2d 126, 130 (8th Cir. 1977). In addition, the appellate court had before it admittedly "strong" evidence of petitioner's incompetence, including his 1939 commitment record; the jury's finding of mental deficiency; and a recent, undisputed psychological evaluation. Weisberg, 473 N.W.2d at 383. This evidence was more than sufficient to contradict and overcome petitioner's rote recitations in his plea petition and hearing testimony that he 'understood' the charge and the guilty plea proceedings. See Gonzales v. Grammer, 848 F.2d 894, 900 (8th Cir. 1988). Due to his low intelligence, petitioner was essentially unqualified to testify as to his own level of understanding.

This Court concludes that the state appellate court's finding that petitioner was competent is not fairly supported by the record and is therefore not entitled to a presumption of correctness. See 28 U. S. C. § 2254 (d) (8). In doing so, this Court is aware that the Supreme Court has taken a very limited view of the circumstances under which a federal court may properly reject state court factual findings regarding competency. See Maggio, 462 U.S. at 113-18; Lonberger, 459 U.S. at 434-35. This case, however, is readily distinguishable from both Maggio and Lonberger on its unique facts.

In Maggio the defendant, who had no history of mental or emotional difficulties, raised the issue of his competency on the eve of trial based upon a report of a single psychiatrist who met with him for one hour. 462 U.S. at 112-13. The state trial court characterized the issue as a delaying tactic and properly refused to conduct a further inquiry into the defendant's competency, ample evidence of which was supplied by his subsequent conduct at trial. Id. at 113-16. In Lonberger, the court ruled that the Sixth circuit was not justified in rejecting a state court's "implicit" finding that the defendant's testimony regarding his plea was not credible. 459 U.S. at 434-36 and n.5. In contrast, here no evidentiary

hearing was ever held in state court on the issue of petitioner's competency and there are accordingly no written state court findings which are based upon the credibility of witnesses. See Matusiak, 786 F.2d at 543 (discussing Maggio and Lonberger).

Based upon the record, the Court further finds petitioner has demonstrated by "clear and convincing evidence" that he was not in fact competent to enter a guilty plea to the January 9, 1989 complaint. Id. at § 2254(d); see also Long v. State of Iowa, 920 F.2d 4, 6 (8th Cir. 1990) (habeas petitioner has the burden of showing that conviction should be set aside). Important to the Court's decision is the fact that respondent has never challenged Dr. Perkin's expert opinion that petitioner is so mentally retarded that he is incapable of understanding that his gambling activities are illegal.[12] The Court also places great weight upon the two previous judicial determinations - one by a probate court and the other by a jury - that petitioner is in fact "feebleminded" and "mentally deficient." See Petitioner' s Exhibits 3 and 5(c) - This Court will presume that these written findings are correct, there being no reason to doubt their validity. See 28 U.S.C. § 2254(d). The Court rejects respondent's argument that these findings do not tend to establish petitioner's lack of competency, as there is no reasoned basis to believe petitioner's mental faculties were any different at the time he entered his guilty plea.

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[12] Respondent has not requested an evidentiary hearing in this Court, apparently choosing to rely upon the written record. See Blalock v. Lockhart, 898 F.2d 1367, 1371 (8th Cir. 1990) (remanding habeas corpus case to district court with instructions to hold an evidentiary hearing on question of whether petitioner's guilty plea was knowing, voluntary, and intelligent).

Further, the facts of this case are similar to other cases[13] in which a court has found that a defendant lacked the mental capacity to validly waive constitutional rights. See Henderson, 426 U.S. at 642-46 (guilty plea invalid even though defendant found competent to stand trial); Tiller, 911 F.2d at 576-78 (guilty plea invalid without competency hearing); Matusiak, 786 F.2d at 544-45 (same); Cooper v. Griffin, 455 F.2d 1142, 1143-45 (5th Cir. 1972) (mentally retarded defendants could not validly waive Miranda rights); United States v. Maroney, 228 F.Supp. 800, 801 (W.D.Pa. 1964) (guilty plea invalid).

In addition to his demonstrated lack of competency, petitioner's guilty plea was also unintelligent and involuntary because the record does not affirmatively show that the essential element of criminal intent was ever explained to him. "It is well established that a plea of guilty cannot be voluntary in the sense that it constitutes an intelligent admission that the accused committed the offense unless the accused has received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" Lonberger, 459 U.S. at 436 (quoting Smith v. Grady, 312 U.S. 329, 334 (1941)); see also Henderson, 426 U.S. at 645 (same); Gregory v. Solem, 774 F.2d 309, 314 (8th Cir. 1985), cert. denied, 475 U.S. 1088 (1986) (same). Here there is nothing in the plea petition or transcript of the guilty plea hearing to show that the essential element of criminal intent, which was omitted from the complaint, was ever explained to petitioner by anyone, and none of the state courts made any contrary factual findings on this issue.[14] It seems

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[13] Since a finding that a defendant is incompetent often concludes a criminal proceeding prior to conviction, it is not surprising that there are relatively few reported cases on the issue.

[14] The Court believes that the complete lack of any allegation of criminal intent in the complaint, together with petitioner's demonstrated mental deficiency, combine to preclude application of a "presumption that counsel explained the nature of the charge to defendant . . . ."

clear from petitioner's statements that if he had been asked at the guilty plea hearing whether he intended to break the law or commit a crime when he took bets, his response would surely have indicated his complete lack of understanding of the essential element of intent.[18] That petitioner was never properly advised of the intent element is perhaps understandable in light of his limited intelligence, but it is nevertheless not excusable. See Henderson, 426 U.S. at 647 (vacating guilty plea and murder conviction where defendant, who had "unusually low mental capacity," was never informed of element of criminal intent). The same result should obtain here.

The Court concludes that because petitioner has shown by clear and convincing evidence that he was incompetent to enter a guilty plea, he is now entitled to habeas corpus relief to include the vacating of his guilty plea and conviction.

3. Alleged Coercion of Guilty Plea

Petitioner also argues that the voluntariness of his guilty plea is called into question by the terms of the plea agreement, which provided that a pending charge against petitioner's brother would be dismissed and $30,000 in seized funds

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Gregory, 774 F.2d at 315; see also Henderson, 426 U.S. at 647 (presumption that counsel explained charges "may be appropriate in most cases . . . .").

[18] The crime of sports bookmaking is unlike more traditional crimes at common law, which proscribe conduct that is "malum in se" and not merely "malum prohibitum." See United States v. Donahue, 948 F.2d 438, 441 (8th Cir. 1991), cert. denied, 118 L.Ed.2d 314 (1992) (discussing sufficiency of indictment alleging bank robbery, which is "malum in se"). The State of Minnesota no longer regards gambling as morally wrong, and, unlike a bank robbery, a gambler could unintentionally commit a technical violation of Minnesota's sports bookmaking law simply through careless record keeping.

returned to the brother. See Plea Petition, Petitioner's Exhibit 7, at 5-6.

The mere existence of a plea agreement does not render a guilty plea involuntary. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). In light of petitioner's limited intelligence, his close relationship with his brother, and the then-recent seizures of all currency found in their residence and elsewhere, it is possible that such an offer simply overwhelmed petitioner's will. See Transcript, Petitioner's Exhibit 8, at 10 (over $400,000 in cash seized); id. at 11 (petitioner states: "I did it for my brother."). A similar situation was presented in United States v. Commisano, 599 F.2d 851 (8th Cir. 1979), where the Eighth Circuit ruled that a guilty plea was involuntary where the trial court had implied that the plea was required as a condition for the court's acceptance of a separate plea agreement favorable to the defendant's brother. Id. at 856-57.

Since the Court has already determined that petitioner is entitled to habeas relief for the reasons discussed above, the Court need not rule upon this ground and declines to make it a basis for the decision in this matter.

RECOMMENDATION

Based upon the foregoing, **IT IS HEREBY RECOMMENDED** that petitioner's application for writ of habeas corpus be granted, and that respondent be directed to forthwith take all appropriate and necessary actions to secure the withdrawal of petitioner's guilty plea, the vacation of his conviction for sports bookmaking, and the dismissal of the complaint dated January 9, 1989.

s/s
FLOYD E. BOLINE
UNITED STATES MAGISTRATE JUDGE

Dated: January 19, 1993

Pursuant to Local Rule 72.1 (c) (2) any party may object to this filing with the Clerk of Court, and serving all parties by February 2, 1993, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

STATE OF MINNESOTA

IN COURT OF APPEALS

C5-91-135

Ramsey County
District Court #4480847

Lansing, Judge

State of Minnesota,

Respondent,

Hubert H. Humphrey, III
Attorney General
200 Ford Building
117 University Avenue
St. Paul, MN 55155

Thomas Foley
Ramsey County Attorney
Mark N. Lystig
Assistant Ramsey County Attorney
350 St. Peter, Fifth Floor
St. Paul, MN 55102

vs.

Max Weisberg,

Appellant.

Ronald I. Meshbesher
Jack S. Nordby
Meshbesher & Spence, Ltd.
1616 Park Avenue
Minneapolis, MN 55404

Filed: August 13, 1991
Office of Appellate Courts

SYLLABUS

The probation order defines the conditions of probation, and revocation must be based on clear and convincing evidence of a violation of a condition.

Affirmed in part and reversed in part.

Considered and decided by Klaphake, Presiding Judge, Lansing, Judge, and Davies, Judge.

OPINION

LANSING, Judge

This appeal challenges the revocation of probation for violation of a condition imposed after conviction for a sports bookmaking offense. We affirm the trial court's denial of the motion to vacate the original conviction but reverse the order revoking probation.

FACTS

In 1989 Max Weisberg pleaded guilty to sports bookmaking, a violation of Minn. Stat. § 609.75. The court imposed a 15-month sentence but stayed execution of the sentence on condition that Weisberg not commit the same or similar violations and that he perform 100 hours of community service.

In May 1990 Weisberg was again charged with sports bookmaking in violation of Minn. Stat. § 609.75. In a bifurcated trial, a jury found that Weisberg engaged in sports bookmaking but acquitted him by reason of mental deficiency. After trial, the state moved to revoke probation, and Weisberg moved to vacate his earlier conviction because (1) the

complaint failed to state the essential elements of the offense, and (2) the plea was involuntary and unintelligent.

The court denied Weisberg's motion to vacate the earlier conviction and revoked his probation. Rather than execute the original sentence, the court again placed Weisberg on probation, subject to the additional condition that Weisberg serve 20 nonconsecutive days in jail. The days to be served surrounded the Super Bowl and the state high school hockey and basketball tournaments. Weisberg challenges the court's denial of his motion to vacate and its revocation of his initial probation order.

ISSUES

1. Can the 1989 probation be revoked for a 1990 sports bookmaking charge that resulted in an acquittal by reason of mental deficiency?

2. Did the trial court err by refusing to vacate Weisberg's 1989 conviction either because the complaint failed to state essential elements of the offense or because the plea was unintelligently or involuntarily given?

ANALYSIS

I

In determining whether Weisberg violated the conditions of his probation, the trial court declined to treat as dispositive the jury's verdict of not guilty by reason of mental deficiency on the 1990 charge of sports bookmaking. Weisberg contends that the court abused its discretion by revoking probation for the same conduct for which he had been charged and acquitted by reason of mental deficiency. See State v. Austin, 295 N.W.2d 246, 249-50 (Minn. 1980) (before probation may be

revoked, court must find that violation was intentional or unexcusable).

In imposing terms of probation, the trial court may proscribe acts that are not criminal, but the defendant must be given adequate warning of the conduct prohibited. Austin, 295 N.W.2d at 251. At sentencing, the court warned Weisberg against gambling in general, but the order of probation specifically required only that Weisberg "remain law-abiding and have no same or similar violations" and perform 100 hours of community service.

The probationary conditions were reasonable, and the transcript demonstrates the fairness that Weisberg was afforded throughout the proceedings. Nevertheless, because Weisberg was acquitted of the second charge of sports bookmaking, the court lacked the requisite factual basis for finding that Weisberg had engaged in a similar violation of law. See Minn. R. Crim. P. 27.05, subd. 3 (3); Austin at 250 (revocation requires violation of a specific condition of probation). Consequently, the revocation of Weisberg's probation must be reversed.

II

Although we reverse the revocation, we address the issues relating to the validity of the 1989 conviction because Weisberg's probation from that offense is continuing. The trial court rejected Weisberg's argument that, because the complaint failed to state an essential element of the sports bookmaking offense and because his plea was not intelligently or voluntarily entered, his original plea should be vacated.

Minn. R. Crim. P. 15.05 allows postsentence withdrawal of a plea only to correct a manifest injustice and only if the motion to withdraw is timely. See also Minn. Stat. § 590.04, subd. 3 (1990). Rules 2.01, 17.02, subd. 3, and 17.06 similarly permit a complaint to be dismissed for the failure to

allege essential facts if the defect prejudices the substantial rights of the defendant.

Although Weisberg challenged the validity of his plea before sentencing on the 1989 violation, he did not challenge the specificity of the complaint until after the state moved to revoke his probation. Because Weisberg waited 17 months to challenge the complaint, his motion to vacate on this ground was untimely. See State v. Lopez, 379 N.W.2d 633, 636 (Minn. App. 1986), pet. for rev. denied (Minn. Feb. 14, 1986).

Even if the motion were timely, the alleged defects in the complaint did not cause manifest injustice or prejudice. See State v. Serstock, 402 N.W.2d 514, 519 (Minn. 1987). The elements of the offense were adequately set forth and Weisberg acknowledged in extensive questioning before entering his plea that he knew the charges against him and had discussed these with his attorney. See id. at 519 n. 5 (detailed preplea questioning, which demonstrated defendant's awareness of the charge, eliminates any prejudice from insufficiency of complaint).

Weisberg also challenges his plea as unintelligent and involuntary. See State v. Trott, 338 N.W.2d 248, 251 (Minn. 1983). Although Weisberg raised this claim in his initial motion to withdraw his 1989 plea, because the issue was not resolved on a direct appeal, postconviction consideration is not foreclosed. See Wensman v. State, 342 N.W.2d 150, 151 (Minn. 1984).

We cannot agree with Weisberg's claim that the jury's finding of mental deficiency on the 1990 charge should have been given collateral estoppel effect on the issue of his competency to plead to the 1989 offense. The jury considered only Weisberg's competency to commit sports bookmaking at the time of the second offense, and its verdict is not dispositive of Weisberg's capacity at an earlier point in time. See generally State v. McAlpine, 352 N.W.2d 101, 103 (Minn. App. 1984). The evidence supporting incompetency,

including commitment records, the jury's recent verdict, and a psychologist's report, is strong but not conclusive. See Gilles v. State, 299 Minn. 158, 159, 216 N.W.2d 898, 899 (1974).

Weisberg's competency to enter the plea was supported by a comprehensive plea petition drafted by his attorney and a record showing extensive questioning at the time Weisberg entered the plea. The court's determination of Weisberg's competency to plead guilty in 1989 is adequately supported. See Marhoun v. State, 451 N.W.2d 323, 327 (Minn. 1990).

Finally, Weisberg argues that part of his plea bargain was the dismissal of charges against his brother and that his need to protect a family member from prosecution effectively coerced his plea. See United States v. Commisano, 599 F.2d 851 (8th Cir. 1979). No overt coercion was present in this case. As the state notes, the plea's terms, including a recommendation for probation, were favorable to Weisberg. The record does not establish that his plea was involuntary.

DECISION

The evidence of Weisberg's limited intellectual functioning did not require vacating his guilty plea and corresponding conviction. However, because Weisberg was not found guilty of another gambling offense, we reverse the revocation of his probation.

Affirmed in part and reversed in part.

s/ Harriet Lansing
August 6, 1991

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs. File No. 4480847

Max Weisberg,

Defendant.

ORDER

The above-entitled matter come on for hearing before The Honorable Lawrence D. Cohen, Judge of District Court, on December 4, 1990, in the Ramsey County Courthouse, St. Paul, Minnesota.

MARK N. LYSTIG, ESQ., Assistant Ramsey County Attorney, 350 St. Peter Street, Fourth Floor, St. Paul, Minnesota 55102, appeared representing the Plaintiff.

RONALD I. MESHBESHER, ESQ., of the law firm of MESHBESHER & SPENCE. LTD., 1616 Park Avenue, Minneapolis, Minnesota 55404, appeared representing the Defendant.

This matter was before Court pursuant to Notice of Violation by the State of Minnesota wherein it was alleged that the defendant had violated the terms of the stayed sentence of this Court dated November 16, 1990, by the defendant engaging in a similar offense of bookmaking.

The defendant at that time moved the Court for an order vacating the conviction alleging that the judgment is invalid because the complaint failed to allege the essential elements of the offense of bookmaking and thus the Court lacked

jurisdiction of the offense and for an order setting aside the defendant's plea of guilty because the defendant was mentally deficient at the time of the plea.

On behalf of his motion, the defendant submitted an affidavit of counsel, a letter from Dr. Kenneth A. Perkins, clinical psychologist, dated November 1, 1990, a copy of probate court records in reference to Max Weisberg dated October 4, 1939, a report of examination dated October 6, 1939, and a warrant of commitment of the Probate Court dated October 9, 1939,

In addition, defendant has submitted a 24-page memorandum. The State of Minnesota has submitted a six-page memorandum.

The Court has examined and reviewed the entire file in this matter and now therefore makes the following:

IT IS HEREBY ORDERED that defendant's motion is in all things denied.

Dated at St. Paul, Minnesota, this 17th day of January, 1991

s/s

LAWRENCE D. COHEN
JUDGE OF DISTRICT COURT

MEMORANDUM

The defendant claims that his plea was invalid because his mental condition prevented him from understanding the nature of his conduct, This issue was raised at the time of sentencing, and this Court has already ruled on that issue. The Court has not seen any evidence which convinces this Court that the defendant did not know the difference between right and wrong or that the defendant did not understand the nature of his conduct. This Court believes that the defendant was well aware of the nature of his conduct and that he knew it was wrong.

The jury acquittal in a subsequent case has no binding effect upon this Court concerning the probation violation involved here. This Court was clear in admonishing the defendant at the time of sentencing that he was not to make book and that if he did there would be consequences. This was made an important and clear condition of probation. Mr. Weisberg knew that if he did not obey the Court's conditions that he was in deep and serious trouble.

Concerning the issue relating to jurisdiction over the defendant, the Court agrees with the state that the allegation of sports bookmaking at a particular time and in a particular county is all that is needed to give the defendant notice of the offense so as to raise a defense and to plead former jeopardy if ever charged again, There is no question as to the adequacy of the complaint with all attachments made a part of that complaint.

L.D.C.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Max NMN Weisberg,

Defendant.

D.C. File No. 4480847
C.A. File No. 40925

NOTICE OF VIOLATION

TO: Defendant and his attorney, Ronald I. Meshbesher, 1616 Park Avenue, Minneapolis, Minnesota 55404

PLEASE TAKE NOTICE, that on the 3rd day of December, 1990, at 2:30 PM or as soon thereafter as counsel may be heard, at the District Court in Ramsey County, before the Honorable Lawrence Cohen, the undersigned will move the Court to find that the defendant Max NMN Weisberg has violated the terms of the sentence imposed on November 16, 1989, in that he has engaged in similar offenses. The State of Minnesota will request, upon such a finding, that additional sanctions be imposed upon the defendant.

Respectfully submitted;

/s/

Mark N. Lystig
Assistant Ramsey County
Attorney 350 St. Peter, Fifth
Floor St. Paul, MN 55102
Telephone: 298-4330
Attorney for Plaintiff

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-1948MNMI

Max Weisberg,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
State of Minnesota,	*	
	*	
Appellant.		

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

August 30, 1994

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit